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Notes

Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry

by

ERIN CONNORS MORTON*

The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial.¹

Introduction

An applicant seeking a preliminary injunction² or temporary restraining order³ in the federal courts will typically be required to post a bond as security before the injunction will issue. The portion of Rule 65(c) requiring such security reads:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, *in such sum as the court*

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1. Russell v. Farley, 105 U.S. 433, 438 (1881). The decision predates Federal Rule 65(c) but the objectives in requiring security are the same ones at issue under the Rule.

2. A preliminary injunction is issued to "protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits." 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2947, at 122 (1995).

3. A temporary restraining order (TRO) preserves the "status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction"; the TRO may issue with or without notice to the adverse party. 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2951, at 254. For ease of discussion, waiver of the bond under Rule 65(c) will be discussed in the context of preliminary injunctions. The same issues involved in waiving the bond for preliminary injunctions are raised in waiving the bond for temporary restraining orders.

deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.⁴

By the terms of the Rule, the amount of the bond to be posted is left to the court's discretion. The court is to determine the damages and costs the defendant will incur while the injunction is in place and set the bond accordingly. Rule 65(c) was developed as a mechanism to balance the plaintiff's ability to receive immediate provisional relief with the defendant's protection in the event the defendant was wrongfully enjoined. Protection of the defendant is necessary because the hearing is attenuated, and the defendant will necessarily have less time to prepare for the preliminary injunction hearing. Because the court has a greater chance of being wrong in a preliminary hearing as opposed to a full trial on the merits, the bond serves as a source of compensation for the defendant if the court later determines that the defendant was wrongfully enjoined. In 1983, the Supreme Court explicitly stated that the bond is the defendant's only source of compensation for damages from wrongful enjoinder.⁵

Over the last twenty years, courts have been faced with bond waiver requests from indigent plaintiffs or groups challenging actions under a federal statute, such as the National Environmental Policy Act. The circuits have varied in their treatment of these bond waivers for injunctions sought in "the public interest." The circuits have also had trouble establishing guidelines for the district courts to follow in deciding when a bond waiver is appropriate, even though such waivers leave the defendant without the compensation that the bond ensures.

Rather than treating the security requirement as mandatory and carving out narrow exceptions for these public interest litigants, at least two circuits have interpreted the language of Rule 65(c) as vesting the trial court with unfettered discretion to waive the bond.⁶ Other circuits, while recognizing that the bond is mandatory and that the court's discretion is limited to setting the amount of the bond, have formulated narrow exceptions for which waiver is appropriate.⁷ In deciding whether to waive the bond most courts balance the harm the plaintiff may incur if the injunction is denied for inability to post the bond against the harm to the defendant, who may ultimately be denied compensation.

The inconsistent and wide variations in the reasoning used to support bond waivers in the various circuits have left lower courts confused. The confusion has resulted in dissimilar treatment for similarly

4. FED. R. CIV. P. 65(c) (emphasis added).

5. *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 770 n.14 (1983).

6. See *infra* notes 100-120 and accompanying text.

7. See *infra* notes 58-93 and accompanying text.

situated litigants in the federal courts. The most dramatic example consists of the widely disparate reasoning and bond amounts in several contemporaneous Employee Retirement Income Security Act (ERISA) class-action cases in different circuits. In each of these cases, the district courts had difficulty in balancing the harm to the retired employee plaintiffs with the compensation necessary to protect the defendant. Consequently, very different bond amounts were required despite the similar circumstances presented.⁸

This Note discusses the history and purpose of Rule 65(c), arguing that the bond is mandatory and that security must be posted before the injunction may issue. Part II analyzes the different interpretations of the Rule prevailing among the circuits. Part III describes the development of various exceptions to the Rule's requirement, *i.e.*, the allowances made primarily for indigents and nonprofit environmental litigants. The confusion in the lower courts arising from inconsistent application and inappropriate extensions of these exceptions is discussed in Part IV; an analysis of the disparate results in the ERISA cases is presented in Part V. In conclusion Part VI proposes the analysis that ought to be used in evaluating whether an exception warrants waiver of the bond and suggests modifications to the Federal Rules of Civil Procedure to accomplish such a result.

I. Purpose of the Bond under Rule 65(c)

The security requirement for provisional injunctions, as in Rule 65(c), was originally developed to protect both the court and the defendant. An early case considering the history of the bond requirement stated that:

Its object was . . . to protect the Court as well as the Defendant from improper applications for injunctions. If the evidence in support of the application suppressed or misrepresented facts, the Court was enabled not only to punish the Plaintiff but to compensate the Defendant. . . . The Court therefore required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression.⁹

8. Compare *Alexander v. Primerica Holdings, Inc.*, 811 F. Supp. 1025 (D.N.J. 1993) (bond set at \$7,733,514) with *Warner v. Ryobi Motor Prods. Corp.*, 818 F. Supp. 907 (D.S.C. 1992) (nominal bond of \$250 required) and *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261 (W.D. Mich. 1990) (bond set at \$50,000); *Hinckley v. Kelsey-Hayes Co.*, 866 F. Supp. 1034 (E.D. Mich. 1994) (bond set at \$55,000); *Helwig v. Kelsey-Hayes Co.*, 857 F. Supp. 1168 (E.D. Mich. 1994) (bond of \$95,000); *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410 (E.D. Mich. 1994) (bond of \$100,000).

9. *Smith v. Day*, 21 Ch. D. 421, 424 (Ch. App. 1882) (cited in Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C. L. REV. 1091, 1094 n.11 (1974); Reina Calderon, Note, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13

Modern courts have similarly described the purposes of the bond as protecting the defendant, the plaintiff, and the court.

A. Serves as a Fund to Compensate Defendant

A primary function of the bond is to serve as a fund to ensure compensation to a wrongfully enjoined defendant.¹⁰ One commentator has suggested that the bond's purpose is to compensate the defendant "who has been subjected to a process of law that does not meet the kind of standards ordinarily adopted" for a full trial on the merits.¹¹ Regardless of the financial resources of the plaintiff, the defendant will be limited to the amount of the bond in recouping costs and damages incurred during the injunction. Courts have waived security when they have found the applicant for the bond to be either highly likely to succeed on the merits¹² or financially responsible.¹³ However, waiver of the security leaves the defendant vulnerable. In the absence of a security bond, the wrongfully enjoined party has no recourse for damages incurred while wrongfully enjoined.¹⁴

The bond serves as the only remedy; even if the defendant later wins on the merits, the defendant has recourse only against the bond.¹⁵ The bond also facilitates the defendant's collection of com-

B.C. ENVTL. AFF. L. REV. 125, 140 n.86 (1985); Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333, 333 (1959)).

10. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 210 (3d Cir. 1990) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 (3d Cir. 1989)); *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989); *Curtis 1000, Inc. v. Youngblade*, No. C94-4117, 1995 U.S. Dist. LEXIS 1514, at *166-67 (N.D. Iowa Jan. 27, 1995); *Stiefel & Co. v. Blitz*, No. 93 Civ. 6080(PNL), 1994 U.S. Dist. LEXIS 62, at *2 (S.D.N.Y. Jan. 4, 1994); *National Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1134 (D.C. Cir. 1992); Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 HARV. L. REV. 828 (1986) [hereinafter *Recovery Note*]; Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333, 333 (1959); see also *Russell v. Farley*, 105 U.S. 433, 439 (1881) (predating Rule 65 but discussing the imposition of security to ensure that the ultimately successful party would emerge in the same position it would have held had the interference in question not occurred).

11. Dobbs, *supra* note 9, at 1094.

12. See *infra* notes 201-03 and accompanying text.

13. See, e.g., *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782-83 (10th Cir. 1964) (waiving bond because of plaintiff's apparent ability to pay damages); *Specialty Chems. & Servs., Inc. v. Chandler*, No. 1:87-CV-2338-MHS, 1988 U.S. Dist. LEXIS 16090, at *16 (N.D. Ga. Sept. 26, 1988) (finding that plaintiff was "sufficiently solvent to pay defendants' costs should it lose at trial").

14. *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 770 n.14 (1983) ("A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond."). *Id.*

15. *Id.* at 770 n.14; *Instant Air*, 882 F.2d at 804; *Continuum*, 873 F.2d at 803; *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 n.5 (3d Cir. 1988); *International Ass'n of Machinists v. Eastern Airlines, Inc.* 925 F.2d 6, 10 (1st Cir. 1991) (finding

pensation for wrongful enjoinder by eliminating both the need to pursue separate litigation to collect damages and the risk of the plaintiff's possible insolvency.¹⁶ As the Fifth Circuit pointed out, courts that waive the bond requirement, and thus provide no fund with which to compensate defendant, either "unjustly deny the defendant compensation, or to compensate the defendant, . . . [defeat] the reasonable expectations of the plaintiff."¹⁷

B. Deters Rash Applications

Second, the bond serves to deter rash applications for interlocutory orders and thus avoids wasting the court's time with flimsy applications.¹⁸ The bond forces the plaintiff "to consider the injury to be inflicted on its adversary in deciding whether to press ahead"¹⁹ with a possibly losing claim. The financial obligation encourages caution in plaintiffs before applying for relief. As Justice Stevens described the purpose of the bond in *Edgar v. Mite Corporation*:²⁰

Since a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully. The bond, in effect, is the moving party's warranty that the law will uphold the issuance of the injunction.²¹

liability limited to terms of bond unless malicious prosecution or bad faith proved); see also *Adolph Coors Co. v. A & S Wholesalers, Inc.* 561 F.2d 807, 813 (10th Cir. 1977) (same); *Buddy Sys. Inc. v. Exer-Genie, Inc.*, 545 F.2d 1164, 1167 (9th Cir. 1976). *Contra* *Dignet, Inc. v. Western Union, No. 91C 156*, 1994 U.S. Dist. LEXIS 7240, at *4-9 (N.D. Ill. June 1, 1994) (holding that the City of Chicago could be liable for an amount over the bond under the theory of judicial estoppel because of the City Attorney's representations at the preliminary injunction hearing that the City was solvent and "good for the damages" and that it would be a waste of public resources" to require the City to pay fee to surety).

16. *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir. 1990) (quoting *Continuum*, 873 F.2d at 803).

17. *Continuum*, 873 F.2d at 804.

18. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 211 (3d Cir. 1990) quoting *Instant Air*, 882 F.2d at 804; see also *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 392 (7th Cir. 1983) (discourages the seeking of preliminary injunctions on flimsy grounds); *Dobbs*, *supra* note 9, at 1119 (stating that "it is desirable to discourage the harassing plaintiff by insisting that he risk something himself").

19. *National Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1134 (D.C. Cir. 1992) ("The deterrence of flimsy claims depends on this."); *Curtis 1000, Inc. v. Youngblade, No. C94-4117*, 1995 U.S. Dist. LEXIS 1514, at *167-68 (N.D. Iowa Jan. 27, 1995); *Dobbs*, *supra* note 9, at 1094.

20. 457 U.S. 624 (1982).

21. *Id.* at 649 (Stevens, J., concurring) (footnote omitted).

The bond requirement also discourages plaintiffs who would otherwise use an injunction application as a viable but ultimately meritless litigation tactic against the defendant.²²

Arguably, the bond requirement may deprive those who cannot afford to post security of interlocutory relief. However, the Supreme Court, in *Cohen v. Beneficial Industrial Loan Corp.*,²³ upheld an analogous security-for-expenses bond despite the fact that such a bond requirement might "foreclose resort by most stockholders."²⁴ In *Cohen*, the Court upheld the validity of a state statute that required plaintiffs who owned less than a certain amount of stock to post a bond that would cover the corporation's anticipated expenses before they could bring suit in a shareholder derivative action.²⁵

Security-for-expenses statutes, like the one at issue in *Cohen*, were enacted in reaction to suits brought by unscrupulous shareholders who owned less than a prescribed amount of stock.²⁶ According to a 1944 study commissioned by the New York Chamber of Commerce, these strike suits were brought by shareholders with small holdings solely to harass corporations and force them into substantial private settlements.²⁷ The goal of the security-for-expenses statutes was similar to that of Rule 65(c): By requiring security, the legislature intended to instill "a threshold of responsibility" in those bringing suit.²⁸

22. Dobbs, *supra* note 9, at 1094.

23. 337 U.S. 541 (1949).

24. *Id.* at 552.

25. *Id.* at 554-55.

26. *Id.* at 548-49.

27. 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1835, at 148 (citing F. WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS (1944) (surveying shareholder derivative suit activity in 1930s)). The survey also found that the bulk of the litigation was handled by a limited number of attorneys. Note, *Security for Expenses in Shareholders' Derivative Suits: 23 Years' Experience*, 4 COLUM. J.L. & SOC. PROBS. 50, 52 (1968) [hereinafter *23 Years' Experience*].

28. 7C WRIGHT, MILLER & KANE, *supra* note 27, § 1835, at 148 (describing proponents' rationale). Such legislation has not been without its critics. Three main criticisms are outlined in 2 AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.04 cmt. h (1994): They tend to chill meritorious and nonmeritorious actions alike; they can be outflanked by plaintiffs pleading a federal cause of action or urging other shareholders to join in the suit to satisfy the threshold; they tend to discriminate unfairly between large and small shareholders. See also *23 Years' Experience*, *supra* note 27, at 65 (finding security-for-expenses statutes are "no longer a significant deterrent to derivative litigation whether the suit is meritorious or not"); Note, *Security for Expenses Legislation*, 52 COLUM. L. REV. 267, 281 (1952) (supporting security-for-expenses legislation but acknowledging that there has been "considerable controversy over the wisdom of such statutes"). Commentators have also criticized the motives of proponents of the legislation. See, e.g., George D. Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COLUM. L. REV. 1, 3-8 (1947) [hereinafter Hornstein, *New Aspects*] (opining that the New York legislation was "clearly designed" to insulate corporate man-

Legislation did in fact reduce the number of suits immediately following its passage in New York.²⁹ At the foundation of much of the criticism of security-for-expenses statutes is the argument that they completely foreclose small shareholders' access to judicial relief. In the case of Rule 65's security requirement, however, plaintiffs are not completely denied relief; instead they merely are required to wait until the final decision on the merits.

Arguably, when the bond is waived for indigent plaintiffs, there is also an increased risk of frivolous suits. One court has stated that its scrutiny of the factors necessary for the issuance of a preliminary injunction adequately protects the government body being sued,³⁰ while a second court simply stated that the plaintiffs were unable to afford the bond, and thus it should be waived.³¹

Two distinctions from shareholder derivative suits may be made in cases involving indigent litigants. First, the shareholder derivative suit involves, by its nature, a commercial transaction. Suits involving indigent plaintiffs in which the bond has been waived generally are not commercial³² and usually challenge the denial of public benefits. A second and more important distinction from the plaintiff in a shareholder derivative suit is that the indigent plaintiff is most likely challenging administrative action under a social welfare statute.³³ One authority, and at least one court, has suggested that proceeding under an *in forma pauperis* statute may override the bond requirement in certain circumstances.³⁴

The line of environmental cases is less straightforward. Courts have held that requirement of a bond under a strict reading of Rule 65(c) would effectively deny judicial review of administrative decisions to public interest groups suing under NEPA.³⁵ Again, courts are

agement and noting the significant drop-off in shareholder derivative suits after it was enacted); George D. Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CAL. L. REV. 123 (1944) (tracing legislation's enactment and criticizing the report on which it was based).

29. In the two and a half years after the law's enactment, only four stockholders' suits involving widely-held corporations were brought in the Supreme Court in New York County. The annual average was fifty in the preceding decade. Hornstein, *New Aspects*, *supra* note 28, at 5. Hornstein argues that the legislation was passed to insulate corporate management by depriving small shareholders of their ability to challenge corrupt management. *Id.* at 3.

30. *Bass v. Richardson*, 338 F. Supp. 478, 491 (S.D.N.Y. 1971).

31. *Denny v. Health & Soc. Servs. Bd.*, 285 F. Supp. 526, 527 (E.D. Wis. 1968).

32. *But see* *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692 (7th Cir. 1977) (involving indigent plaintiff in an insurance suit).

33. *See, e.g., Bass*, 338 F. Supp. at 478.

34. *Denny*, 285 F. Supp. at 527; 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2954, at 299-301.

35. *See, e.g., California ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985).

less worried about frivolous suits and more concerned with providing the judicial review Congress intended under the statute. One student commentator has argued that statutes providing for suits by "private attorneys general" are situations in which Congress has already "determined which policies are important enough" to excuse plaintiffs from paying normal litigation costs.³⁶

The bond requirement's purpose in avoiding flimsy suits is undercut in the circuits which have declared that the bond is discretionary. Requiring more than a nominal bond in every case forces plaintiffs to put some of their own funds at risk.³⁷ The lack of well-defined limits for appropriate bond waivers, in the circuits that view the bond as discretionary, may result in more flimsy suits being filed than in those holding that the bond is mandatory.

C. Notifies Plaintiff of Maximum Extent of Liability

While the bond requirement may be viewed as a barrier to injunctive relief by some plaintiffs, it also provides a significant benefit to them. The bond protects the plaintiff by setting the maximum price that the plaintiff will have to pay if the court later determines that the injunction was wrongful.³⁸

Other courts have viewed the plaintiff's fulfillment of the bond provision as consent to liability up to the amount of the bond, *i.e.*, the "price for the injunction."³⁹ The extent of the damages awarded may

36. *Recovery Note*, *supra* note 10, at 835 n.29.

37. *See* Dobbs, *supra* note 9, at 1119 (forcing plaintiffs to risk funds may discourage the harassing plaintiff).

38. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 210 n.31 (3d Cir. 1990) (citing *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 770 n.14 (1983)); *see also* *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804-05 (3d Cir. 1989) (bond informs plaintiffs of price they can expect to pay); *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989) (same); *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 393 (7th Cir. 1983) (limiting liability to the bond posted); *Buddy Sys., Inc. v. Exer-Genie, Inc.*, 545 F.2d 1164, 1168 (9th Cir. 1976), *cert. denied*, 431 U.S. 903 (1977) (same); *Recovery Note*, *supra* note 10, at 831-32 (stating that the bond should be the limit of plaintiff's liability); *but see* *Diginet, Inc. v. Western Union ATS, Inc.*, No. 91 C156, 1994 U.S. Dist. LEXIS 7240, at *6 (N.D. Ill. June 1, 1994) (holding that plaintiffs may lose the limitation on liability by asking court to waive the bond because of their ability to satisfy judgment). The Fifth Circuit has creatively allowed a preliminary injunction to remain in place when a plaintiff could not afford a tenfold increase in the bond, but was willing to sign an undertaking to pay any damages from the injunction. *Continuum*, 873 F.2d at 804.

39. *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990) (quoting *Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793, 800 (2d Cir. 1977), *cert. denied*, 434 U.S. 923 (1977)); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 724 (9th Cir. 1986) (same); *Christ Gatzonis Elec. Contracting, Inc. v. New York City Sch. Constr. Auth.*, No. CV-93-2418 (CPS), 1993 U.S. Dist. LEXIS 9147, at *16-17 (E.D.N.Y. July 2, 1993) (same).

vary, based on the prevailing standard of the circuit,⁴⁰ but some measure of damages will generally be awarded if the court determines the restrained party was wrongfully enjoined. There is no single standard among all the circuits defining wrongful enjoinder,⁴¹ but one commentator has suggested that an injunction "wrongfully restrains" a defendant only when it "prohibits him from doing what a court finds he had a legal right to do."⁴² Regardless of the standard used to determine wrongful enjoinder, the applicant must anticipate being liable for damages, but only up to the amount of the bond. The concept of "plaintiff consent" to liability is especially important since the court will be obliged to award damages under the bond unless sufficient reasons to the contrary exist.⁴³

D. Protects the Court When It Has a Higher Than Usual Chance of Committing Error

Finally, but perhaps most importantly, the bond provides the means by which the court can make the defendant whole if it makes an erroneous decision about the merits of the case.⁴⁴ Courts have admitted that they are more likely to commit error after an attenuated injunction hearing, in which they make only provisional findings of fact.⁴⁵ The Ninth Circuit, in declining to exempt Indian tribes from the bond requirement under the auspices of sovereign immunity,⁴⁶

40. The Eleventh Circuit described three different standards prevailing among the circuits in determining the novel question of its own: automatic damages, malicious prosecution, and the one it chose, judicial discretion. *Siegelman*, 925 F.2d at 388-90.

41. See, e.g., *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994) (holding that wrongful enjoinder occurs when the enjoined party had the right all along to do what it was enjoined from doing); *Blumenthal*, 910 F.2d at 1054-55 (same). Compare *Alabama ex rel. Siegelman v. United States Envtl. Protection Agency*, 925 F.2d 385, 386 (11th Cir. 1991) (improper restraint when permanent injunction dissolved); *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 390 (7th Cir. 1983) (proper to award damages on bond when grant of injunction reversed).

42. *Recovery Note*, *supra* note 10, at 829. The author discusses prevailing standards and compares a variety of situations before recommending a standard. *Id.* at 836-42.

43. *Alabama ex rel. Siegelman v. United States Envtl. Protection Agency*, 925 F.2d 385, 390 (11th Cir. 1991) (quoting *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 392 (7th Cir. 1983)). Many circuits follow a similar rule. The difference in circuits in awarding damages under the bond is the subject of *Recovery Note*, *supra* note 10.

44. See *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 210 (3d Cir. 1990) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 (3d Cir. 1989) for the proposition that requiring a bond to protect defendants is especially important in the preliminary injunction context because the court has a higher chance of error).

45. *Hoxworth*, 903 F.2d at 210 (quoting *Instant Air Freight*, 882 F.2d at 804); *Curtis 1000, Inc. v. Youngblade*, No. C94-4117, 1995 U.S. Dist. LEXIS 1514, at *170-71 (N.D. Iowa Jan. 27, 1995).

46. *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986). Rule 65(c) exempts the United States from posting bond and the tribe had requested that the immunity be extended to them. *Id.*

summarized the reassurance that the courts receive from having the bond in place. The court felt that granting the tribes a de facto permanent waiver for posting security would make courts hesitant in granting tribes injunctive relief, for there would be no security "available to compensate for damages caused by an improvidently issued injunction."⁴⁷

E. History of Rule 65(c)

Rule 65(c) is basically derived from section 18 of the Clayton Act,⁴⁸ as it was enacted in 1914.⁴⁹ Prior to that, the first enactment addressing security for injunctions in the federal courts left the decision whether to require security "in the discretion of the court or judge."⁵⁰ The court was allowed the same discretion in deciding whether to grant the order "with or without security" in section 263 of the Judiciary Act of 1911.⁵¹ Congress repealed this discretionary language and replaced it with section 18 of the Clayton Act.⁵² This section eventually became "the basic language of the judicial code and of rule 65."⁵³ Section 18 of the Clayton Act provided that

no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.⁵⁴

While the early Judiciary Act left the decision whether to require security to the court's discretion, the language of the Clayton Act made the security a mandatory condition precedent to the issuance of the injunction or restraining order. Under the Clayton Act, the court was to determine the bond amount sufficient to cover "the payment of such costs and damages" that might be incurred by the party if wrongfully enjoined.⁵⁵ The Judicial Code of 1926 subsequently incorporated the language requiring security for injunctions from the Clayton Act

47. *Id.* at 724.

48. Clayton Act, ch. 323, § 17, 38 Stat. 730, 737 (1914).

49. Dobbs, *supra* note 9, at 1175. Professor Dobbs described the chronological development in Appendix II of his Article.

50. Act of June 1, 1872, ch. 255, § 7, 17 Stat. 196, 197 (cited by Dobbs, *supra* note 9, at 1174).

51. Judiciary Act of 1911, ch. 231, § 263, 36 Stat. 1087, 1162 (repealed 1914).

52. Clayton Act § 17, 38 Stat. at 737. For other discussions of the history of Rule 65(c), see *Curtis 1000, Inc. v. Youngblade*, No. C94-4117, 1995 U.S. Dist. LEXIS 1514, at *166 (N.D. Iowa Jan. 27, 1995); Dobbs, *supra* note 9, at 1174-75; *Recovery Note*, *supra* note 10, at 829 n.6.

53. Dobbs, *supra* note 9, at 1175.

54. Clayton Act § 18, 38 Stat. at 738.

55. *Id.*

into its general provisions.⁵⁶ The language of the security requirement in Rule 65(c) is virtually the exact language adopted from the Judicial Code and has governed the bond requirement in federal courts since 1914.⁵⁷

The intent of the security requirement is clear on the face of the Act—the bond was designed to serve as a fund from which the defendant could be compensated for wrongful enjoinder, with the exact amount left to the court's discretion. Given this mandatory directive, it is surprising that courts have come to hold that the bond itself is discretionary.

II. A Discretionary or Mandatory Rule?

A. Mandatory with Narrow Exceptions

Recently, the Third,⁵⁸ Fourth,⁵⁹ Fifth,⁶⁰ Seventh,⁶¹ and Federal⁶² Circuits have interpreted the bond requirement as mandatory under the Rule and have held waiver of the bond in all but certain limited circumstances⁶³ to be reversible error. In carving out exceptions to the mandatory bond requirement, these circuits have formulated guidelines for the district courts to follow in considering which plaintiffs can be characterized as proceeding in the "public interest," in balancing hardships to the litigants, and in determining the bond amount and articulating reasons for the chosen amount.

56. Judicial Code of 1926, § 266, 44 Stat. 863, 909 (1926) (codified as 28 U.S.C. § 328).

57. *Recovery Note*, *supra* note 10, at 829 n.6. The Rule's additional language focused on the distinction between the preliminary injunction and the TRO. Dobbs, *supra* note 9, at 1175. "What little material there is generally available on the promulgation of the rules does not indicate extensive debate or reconsideration of rule 65 at all." *Id.*

58. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 209-11 (3d Cir. 1990); *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 803-05 (3d Cir. 1989); *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988); *see infra* notes 64-81 and accompanying text.

59. *District 17, United Mine Workers v. A & M Trucking, Inc.*, 991 F.2d 108, 110 (4th Cir. 1993); *Maryland Dep't of Human Resources v. United States Dep't of Agric.*, 976 F.2d 1462, 1483 (4th Cir. 1992); *see infra* notes 82-87 and accompanying text.

60. *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 130-31 (5th Cir. 1990); *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989); *see infra* notes 88-90 and accompanying text.

61. *Gateway E. Ry. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1141 (7th Cir. 1994); *see infra* notes 92-93 and accompanying text.

62. *Chemlawn Servs. Corp. v. GNC Pumps, Inc.*, 823 F.2d 515 (Fed. Cir. 1987) (reversing preliminary injunction in patent infringement dispute for failure to require security bond and findings under Rule 52(a)); *Digital Equip. Corp. v. Emulex Corp.*, 805 F.2d 380 (Fed. Cir. 1986) (same).

63. *See, e.g., Temple Univ. v. White*, 941 F.2d 201, 219-20 (3d Cir. 1991), *cert. denied sub nom. Snider v. Temple Univ.*, 502 U.S. 1032 (1992) (adopting a public interest exception).

(1) *Third Circuit*

In a trilogy of decisions written in the space of two years, the Third Circuit clearly articulated the policy reasons underlying the mandatory requirement of the bond under Rule 65(c).⁶⁴ Two of the three cases decided the issue of whether the bond could be waived in a commercial dispute between parties with adequate resources for posting the bond. In both cases, the Third Circuit reversed the district court's waiver of the bond, holding that circumstances warranting an exception did not exist, and without the bond, the court would be foreclosed from later awarding a remedy if it were determined that the defendant was wrongfully enjoined.⁶⁵

In the third case, *Hoxworth v. Blinder, Robinson & Company*,⁶⁶ the Third Circuit again reversed the district court's decision to waive the bond. In *Hoxworth*, a class of penny stock investors sought an injunction against a securities firm and its president, alleging securities fraud and civil RICO violations.⁶⁷ The plaintiffs sought a preliminary injunction to keep the company's president from transferring monies overseas during the litigation, an action that would potentially have left the plaintiffs without recovery even if they had prevailed at trial.⁶⁸

The district court based its waiver of the bond requirement on the lack of a "risk of monetary harm to the defendants' in complying with the preliminary injunction and 'because of the chilling effect such a requirement would have on the plaintiffs' ability to proceed with this case.'" ⁶⁹ In reversing the trial court's decision to waive the bond, the Third Circuit anchored its reasoning on the plain language of Rule 65(c), which "admits no exceptions."⁷⁰ Basing its strict interpretation on the "text and policies of [R]ule 65(c)," ⁷¹ the court relied most heavily on three policy reasons. First, the court pointed out that an incorrect interlocutory order may harm the defendant, for the bond provides the only fund from which the defendant may be compen-

64. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 210 (3d Cir. 1990); *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804-05 (3d Cir. 1989); *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 nn. 5 & 7 (3d Cir. 1988).

65. *Frank's GMC Truck*, 847 F.2d at 103; *Instant Air*, 882 F.2d at 805.

66. 903 F.2d 186 (3d Cir. 1990).

67. *Id.* at 189.

68. *Id.* at 191-93.

69. *Id.* at 209 (quoting *Hoxworth v. Blinder, Robinson & Co.*, 1989 U.S. Dist LEXIS 5729, at *34 (E.D. Pa. May 23, 1989)).

70. *Hoxworth*, 903 F.2d at 210. The court quoted an earlier Tenth Circuit case for the proposition that "Rule 65(c) states in mandatory language that the giving of security is an absolute condition precedent to the issue of a preliminary injunction." *Id.* (quoting *Atomic Oil Co. v. Bardahl Oil Co.*, 419 F.2d 1097, 1100 (10th Cir. 1969), *cert. denied*, 397 U.S. 1063 (1970)).

71. *Hoxworth*, 903 F.2d at 210.

sated.⁷² Second, because of the attenuated procedure and the higher than usual chance of being wrong in a preliminary injunction hearing, the protection that the bond provides is especially important.⁷³ Third, the court mentioned the protection that the bond provides the plaintiff in limiting liability to the amount of the bond if the defendant is wrongly enjoined.⁷⁴

The Third Circuit summarized its holding by flatly stating, "Although the amount of the bond is left to the discretion of the court, the posting requirement is much less discretionary. While there are exceptions, the instances in which a bond may not be required are so rare that the requirement is almost mandatory."⁷⁵ The only situation the court acknowledged as a potential exception occurs when the injunction raises "no risk of monetary loss to the defendant."⁷⁶

Given the nature of the investment business in which defendants were engaged, the Third Circuit found liquidity of the funds was crucial and that the injunction created a significant likelihood of financial harm.⁷⁷ Although the bond requirement would "chill" plaintiffs' ability or willingness to seek relief, the Third Circuit held that the barrier fulfilled another purpose of the bond requirement; it deterred "rash applications for interlocutory orders [by] causing plaintiff to think carefully beforehand."⁷⁸

At the end of its discussion, the court analyzed the alternative view of waiver in a footnote.⁷⁹ Although it acknowledged that commentators have recognized exceptions for waiving the bond in cases in which the plaintiff is indigent or suing in the public interest, the court specifically stated that "these exceptions, if they are to be drawn at all, should be drawn narrowly."⁸⁰ With this statement of how neither of the commentators' suggested exceptions would apply to the case before it, the court vacated the injunction.⁸¹

72. *Id.*

73. *Id.* at 210 n.31 (citing *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 (3d Cir. 1989)).

74. *Id.* at 210 (citing *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 770 n.14 (1983)).

75. *Id.* (quoting *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988)).

76. *Id.* (quoting *Frank's GMC Truck*, 847 F.2d at 103).

77. *Id.*

78. *Id.* at 211 (quoting *Instant Air*, 882 F.2d at 804).

79. *Id.* at 211 n.32.

80. *Id.*

81. The court dismissed the two proffered exceptions by stating: "This record contains no evidence that the plaintiffs are indigent. Moreover, we believe suits brought to recover money lost speculating in penny stocks are not so overwhelmingly suffused with the public interest as to justify the judicial rewriting of rule 65(c)." *Id.*

(2) *Fourth Circuit*

The Fourth Circuit found the bond requirement of Rule 65(c) to be a mandatory one in reviewing the district court's waiver in a dispute over administration of the food stamp program in *Maryland Department of Human Resources v. United States Department of Agriculture*.⁸² The district court, based on Maryland's representation that the state could pay any judgment ultimately entered against it, denied USDA's request that Maryland provide security.⁸³ On review, the Fourth Circuit cited *Hoxworth v. Blinder, Robinson & Co.*, holding that failure to require the bond before issuing the preliminary injunction was reversible error because USDA risked financial harm once the preliminary injunction issued whether or not the state would be financially responsible.⁸⁴ The Fourth Circuit stressed that "[t]he district court's refusal to require a bond cannot be defended as the reasonable exercise of discretion to set a 'sum as the court deems proper'" under the Rule.⁸⁵ One year later, the court similarly vacated a preliminary injunction enjoining a trucking company from subcontracting work in violation of its contract with the union because the district court had not required the union to post security.⁸⁶ The Fourth Circuit again stated, "The rule is unambiguous, and the failure to require a bond . . . is reversible error."⁸⁷

(3) *Fifth Circuit*

The Fifth Circuit has also held that security must be posted under Rule 65(c) before a preliminary injunction may issue. In a trade-secret dispute over rights to computer software, the district court partially denied the defendant's request to increase the security supporting the injunction from \$200,000 to \$5 million and compromised by setting the bond at \$2 million.⁸⁸ On appeal, the Fifth Circuit first discussed the policies underlying the bond requirement and criticized courts that would waive the bond, leaving the defendant with nothing against which to recover damages.⁸⁹ However, in its decision, the court alleviated some of the hardship to the plaintiff in procuring a bond at ten times the original amount by leaving the original \$200,000 bond in place and allowing the plaintiff to file an undertaking with the court that the original "amount of the bond [would] not limit the

82. 976 F.2d 1462 (4th Cir. 1992).

83. *Id.* at 1483.

84. *Id.*

85. *Id.* at 1483 (quoting *Hoxworth*, 903 F.2d at 210).

86. District 17, *United Mine Workers v. A & M Trucking, Inc.*, 991 F.2d 108, 111 (4th Cir. 1993).

87. *Id.* at 110 (quoting *Maryland Dep't of Human Resources*, 976 F.2d at 1483).

88. *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989).

89. *Id.* at 803-04.

amount of damages for which it might be liable . . . as a result of a wrongful issuance of the injunction.⁹⁰

(4) *Seventh Circuit*

The Seventh Circuit, in evaluating the adequacy of the injunction bond in a dispute between railways over track rights,⁹¹ held the security to be mandatory⁹² but the amount of security to be fully within the discretion of the district court. The appellate court in *Gateway Eastern Railway v. Terminal Railroad Association*, engages in one of the rare discussions of the method for setting the bond amount that the district court should follow. The court found "the district court never articulated the reason for requiring [the] amount [it did]" and remanded the case for a more definite statement.⁹³

(5) *Undecided Circuits*

Three circuits, the First, Eighth, and Eleventh, have not squarely addressed whether the bond is discretionary or mandatory, but two of them have come close to finding it mandatory in other contexts.⁹⁴ The First Circuit also prescribed a test for appropriate waiver of the bond, without finding the bond itself to be mandatory or discretionary.⁹⁵

B. Discretionary Rule

Despite the history of Rule 65(c) and the clearly articulated purposes discussed by other circuits that support a mandatory bond, the Second,⁹⁶ Sixth,⁹⁷ Ninth,⁹⁸ and Tenth⁹⁹ Circuits have found the re-

90. *Id.* at 804. The Fifth Circuit also found reversible error and vacated a preliminary injunction when the district court had held no hearing or required security for before issuing the injunction. *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir. 1990).

91. *Gateway E. Ry. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1134 (7th Cir. 1994).

92. *Id.* at 1141 (citing *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 597 (7th Cir. 1986)).

93. *Id.* at 1141-42. The Seventh Circuit had earlier held that, even though it had recognized an exception in certain cases, the "court should entertain and expressly rule on [defendant's] request" for security, and "absent extraordinary circumstances, the court errs in not granting it." *Reinders Bros., Inc. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 54 (7th Cir. 1980); *see also* *Chambers v. Briggs & Stratton Corp.*, 863 F. Supp. 900, 907 (E.D. Wis. 1994) (recognizing the rule as mandatory).

94. The Eighth Circuit has reviewed the bond question for a case in which the district court completely neglected to consider the question of requiring a bond. *Rathmann Group v. Tanenbaum*, 889 F.2d 787, 789 (8th Cir. 1989); *see also* *Curtis 1000, Inc. v. Youngblade*, No. C94-4117, 1995 U.S. Dist. LEXIS 1514, at *165, *172 (N.D. Iowa Jan. 27, 1995) (finding that "[a]lmost without exception . . . courts in [the Eighth] circuit have required a bond before issuing a preliminary injunction").

95. *Crowley v. Local No. 82, Furniture & Piano Moving*, 679 F.2d 978, 999-1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1983).

96. *Clarkson Co. v. Shaheen*, 544 F.2d 624, 632 (2d Cir. 1976) (citing *Ferguson*); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir.), *cert. denied*, 417 U.S. 932

quirement of the bond itself, rather than the amount, to be discretionary.

C. The Sixth Circuit Opens the Door to Confusion: The *Urbain* Decision

Courts uniformly required a bond as a condition precedent to issuing a preliminary injunction or TRO prior to 1954.¹⁰⁰ However, in *Urbain v. Knapp Brothers Manufacturing Co.*,¹⁰¹ the Sixth Circuit held that the waiver of a bond by the district court was not reversible error based on an unsupported interpretation of the language of Rule 65(c). The plaintiffs in *Urbain*, decided in 1954, were very different from the plaintiffs typically entitled to a bond waiver today; they were not indigent, nor were they suing under a federal statute in the public interest.

The dispute in *Urbain* was over the infringement of two patents by a manufacturer of display board constructions and chalk troughs. The federal district court in Ohio granted an order, as part of a declaratory judgment proceeding brought by the defendants, restraining plaintiffs from prosecuting a companion action in a federal district court in Illinois.¹⁰² The Sixth Circuit held that the granting of the injunction was proper, falling within the discretion of the district court to stay proceedings in another district.¹⁰³ The district court had the right to enjoin proceedings in which the separate defendants were in

(1974) (citing *Ferguson*); *Ferguson v. Tabah*, 288 F.2d 665, 675 (2d Cir. 1961); see *infra* notes 113-120 and accompanying text.

97. *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 815-16 (6th Cir. 1954), *cert. denied*, 349 U.S. 930 (1955); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 100 (6th Cir. 1982); *Roth v. Bank of Commonwealth*, 583 F.2d 527, 538-39 (6th Cir. 1978).

98. See *California ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) ("The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review.").

99. The Tenth Circuit has not held the bond itself to be mandatory: "[A]t this point we do not decide, nor do we even suggest, whether a bond is mandatory to validate the preliminary injunction." *Coquina Oil Corp. v. Transwestern Pipeline*, 825 F.2d 1461, 1462 (10th Cir. 1987). However, it has required the trial court, at a minimum, to consider whether "a particular case justifi[es] the unusual practice of leaving the enjoined party bereft of security." *Id.* at 1462 (dismissing case for lack of jurisdiction after district court waived bond without discussion). An earlier case, decided by the Tenth Circuit nearly thirty years before *Coquina*, had held the question of security to be within the "wide discretion" of the trial judge and stated that if there was an absence of proof of likelihood of harm, "certainly no bond is necessary." *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964) (citing *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810 (6th Cir. 1954), *cert. denied*, 349 U.S. 930 (1955)).

100. Two narrow exceptions were recognized: a federal court had acquired jurisdiction over property in litigation and a court could control its calendar and stay its own hand. *Dobbs*, *supra* note 9, at 1100.

101. 217 F.2d 810 (6th Cir. 1954), *cert. denied*, 349 U.S. 930 (1955).

102. *Id.* at 813.

103. *Id.* at 815.

privity and the plaintiffs and the issues were identical.¹⁰⁴ While that part of the holding was soundly reasoned, the Sixth Circuit may have unnecessarily interpreted the text of Rule 65(c) too broadly.¹⁰⁵

Two sentences in the *Urbain* decision cracked the door wide enough for confusion to rush in.

The rule leaves it to the District Judge to order the giving of security *in such sum as the court considers proper*. This would indicate plainly that the matter of requiring security in each case rests in the discretion of the District Judge.¹⁰⁶

Rather than properly limiting the court's discretion to the amount of the bond, the court held the bond to be wholly discretionary.¹⁰⁷ The *Urbain* court cited no support for its interpretation of Rule 65(c), and it explicitly ignored other circuits' decisions holding the bond to be mandatory.¹⁰⁸ It was absolutely unnecessary for the court to reinterpret the mandatory language of Rule 65(c) in order to find that no bond was required on the facts of *Urbain*. A sensible exception could have and should have been carved out for orders staying identical actions in other courts where there was no likelihood of harm to the enjoined party. Other circuits, in turn, applied the discretionary reading of Rule 65(c) to a variety of situations far beyond the circumstances present in *Urbain*.¹⁰⁹

D. Expanding Confusion: Other Circuits' Misuse of *Urbain* as Precedent

Many cases since the *Urbain* decision have expanded on its interpretation of Rule 65(c) as discretionary, even where such an interpretation was unnecessary to reach the intended result. These cases have

104. *Id.*

105. The Sixth Circuit could have exclusively found the bond waiver was appropriate based on the marginal risk of loss to appellants because they were getting a full trial on the merits in the Ohio court. "Moreover, in the circumstances encountered here, it would appear that no material damage will ensue to appellants from the failure of the district judge to require a bond of appellees." *Urbain*, 217 F.2d at 816.

106. *Id.* at 815-16 (emphasis in original).

107. *Id.*

108. *Id.* The majority attempted to distinguish *Hopkins v. Wallin*, 179 F.2d 136 (1949), a Third Circuit case, finding that the injunction in *Hopkins* was vacated for other "reasons than the violation of Rule 65(c)." The majority also ignored a case cited by the dissent from the Seventh Circuit vacating an injunction for failure to require a bond. *Id.* at 818 (quoting *Chatz v. Freeman*, 204 F.2d 764, 768 (7th Cir. 1958)).

109. The Sixth Circuit may also have added to the confusion surrounding the extent of the court's discretion by recently citing to the century-old decision of *Russell v. Farley*, an 1881 Supreme Court decision that discussed the injunction bond prior to the existence of Rule 65(c). Division No. 1, Detroit, Bhd. of Locomotive Eng'rs v. CONRAIL, 844 F.2d 1218, 1227 n.15 (6th Cir. 1988) (citing *Russell v. Farley*, 105 U.S. 433 (1881) for the proposition that the court "may order a bond that does not completely secure the enjoined party or the court may decline to order a bond, if necessary 'for the purpose of effectuating justice between the parties'").

cited *Urbain*, and in turn have been used as support by other courts, with little critical re-evaluation of the plain language or the history of the Rule.

Within the Sixth Circuit, the district courts have cited *Urbain* for the precedent that the matter of whether to require security is left to the court's discretion. The *Urbain* precedent has been used to waive the bond in injunctions involving random drug testing¹¹⁰ and trademark infringement¹¹¹ and to support confused applications in the lower courts in the District of Columbia and Ninth Circuits.¹¹²

(1) *Second Circuit*

One of the stepping-stones to the current confusion about the Rule is the Second Circuit's decision in *Ferguson v. Tabah*.¹¹³ In *Ferguson*, a shareholders' derivative action, the court reviewed the district court's entry of an order impounding stock without requiring the posting of a bond.¹¹⁴ The district court had ordered the impoundment of a quarter of a million shares alleged to have been fraudulently issued and, at the time of the order, escrowed in a contemporaneous state court action. The Second Circuit followed the holding of *Urbain*, with little analysis of its facts, in allowing the district court the same vague "wide discretion . . . to require no bond."¹¹⁵ *Ferguson* was similar to *Urbain* in that it involved a situation in which two lawsuits were proceeding simultaneously.¹¹⁶ In reviewing the record, the court stated, "The bizarre history of the issue and transfers of the one million shares fairly demands that the court take physical possession of the certificates. . . . Any possibility that [the plaintiff's] victory might be turned into a pyrrhic one due to the law of negotiable stock transfers in . . . other jurisdiction[s], warrants the impounding of the stock."¹¹⁷

More appropriately, however, rather than repeating the *Urbain* court's misinterpretation of Rule 65(c), the *Ferguson* court should have allowed the injunction to stand without security based narrowly on the lack of a showing of likelihood of harm to the enjoined party.

110. *Plane v. United States*, 750 F. Supp. 1358, 1374 (W.D. Mich. 1990).

111. *Express Mortg. Brokers, Inc. v. Simpson Mortg. Inc.*, No. 94-71056, 1994 U.S. Dist. LEXIS 8764, at *16 (E.D. Mich. May 6, 1994).

112. See, e.g., *California ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (N.D. Cal. 1983); *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 167 (D.D.C. 1971).

113. 288 F.2d 665, 675 (2d Cir. 1961).

114. *Id.*

115. *Id.*

116. In *Ferguson*, one suit was proceeding in New York state court, the other in federal district court; in *Urbain*, two suits were proceeding in federal district courts in Ohio and Illinois.

117. *Ferguson*, 288 F.2d at 673.

Also, the decision could have been based on an exception already recognized in the federal courts at that time, namely that no bond was required "where the injunctive order was issued 'to aid and preserve the court's jurisdiction over the subject matter involved.'"¹¹⁸ Unfortunately, the court went further than necessary, contributing to the confusion in the Second Circuit and in other circuits.¹¹⁹ The Second Circuit, in a case following *Ferguson's* "wide discretion" language, merely cites to *Ferguson* to affirm the district court's waiver of a bond, even though the district court had never even considered the bond question.¹²⁰

(2) *The Seventh Circuit's Digression*

The Seventh Circuit also started down the path to allowing unbounded discretion in 1972 with its holding in *Scherr v. Volpe*,¹²¹ in which citizens challenged a state highway project for failing to comply with NEPA. In *Scherr*, the court stated, "the matter of requiring a security in the first instance was recognized in *Urbain* as also resting within the discretion of the district judge."¹²² Unfortunately, the *Scherr* decision, because it was one of the first cases involving an injunction under NEPA, was in turn widely cited by lower courts, and the confusion spread. The Seventh Circuit did not reverse the impact of its discretionary directive until 1986, in *American Hospital Supply Corp. v. Hospital Products Ltd.*,¹²³ when it held the posting of a bond to be mandatory.¹²⁴

In another challenge under the newly-enacted NEPA, *Natural Resources Defense Council, Inc. v. Morton*,¹²⁵ brought by a group of non-profit environmentalists, the court cites *Urbain* for the proposition that "[i]t is well settled that Rule 65(c) gives the Court wide discretion in the matter of requiring security."¹²⁶ Even though the government

118. *Id.* at 675 (citing *Magidson v. Duggan*, 180 F.2d 473, 479 (8th Cir. 1950), *cert. denied* 339 U.S. 965 (1950)); 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2954, at 305.

119. See, e.g., *Clarkson Co. v. Shaheen*, 544 F.2d 624, 632 (2d Cir. 1976) (citing *Ferguson* for the proposition that "the amount of any bond to be given upon the issuance of a preliminary injunction rests within the sound discretion of the trial court"); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974) (citing *Ferguson* in stating that "the district court may dispense with security where there has been no proof of likelihood of harm to the party enjoined").

120. *Clarkson*, 544 F.2d at 632.

121. 466 F.2d 1027, 1035 (7th Cir. 1972).

122. *Id.*

123. 780 F.2d 589 (7th Cir. 1986).

124. *Id.* at 597. Compare *Reinders Bros., Inc. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 54 (7th Cir. 1980) (shifting toward a mandatory view of bond by holding "absent extraordinary circumstances, the [district] court errs in not granting it").

125. 337 F. Supp. 167 (D.D.C. 1971).

126. *Id.* at 168.

had requested a bond of \$750,000 (with increases of \$2.5 million for each month of delay) to offset estimated lost revenues, the court set the bond at a nominal \$100.¹²⁷ While the nominal bond may have been appropriate for a challenge brought under NEPA,¹²⁸ the use of the *Urbain* reasoning was unsound.¹²⁹

The importance of the mandatory-or-discretionary distinction lies primarily in the extent of guidance that the court of appeals' opinions provide to the lower courts. In circuits in which a bond is considered mandatory, the courts have been more effective in establishing guidelines for exceptions for the lower courts to follow.¹³⁰ When the individual circuit defines the bond requirement as discretionary, there is little principled discussion of the sufficient criteria for the bond waiver or when the waiver is appropriate. Conversely, in circuits in which the bond is held to be mandatory, the waiver of the bond by the trial court is analyzed fully, clear guidelines are established for lower courts to follow, and the bond waiver is allowed in only "exceptional" cases.

III. Exceptions to the Rule

Certain exceptions to the bond requirement have been recognized in most circuits. Waiver of the bond has been held appropriate when the enjoined party faces "no likelihood of material harm",¹³¹ when the court is acting to preserve its subject matter jurisdiction,¹³² when the plaintiff is determined to be indigent and is suing to retain a basic service or public benefit,¹³³ or when the plaintiff is challenging federal agency action under NEPA.¹³⁴ The development of each of these exceptions is discussed *infra*.

The lower courts have had much more difficulty in setting a bond, or justifying waiver of the bond, in cases involving institutional plaintiffs serving or benefitting indigent clients, such as schools or hospitals, or plaintiffs suing under federal statutes other than NEPA, such as ERISA. These situations are less straightforward because the plain-

127. *Id.* at 168-69.

128. See *infra* text accompanying notes 165-75.

129. This unsound reasoning was used by a district court in the Ninth Circuit as well. *Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (N.D. Cal. 1983). The court waived the bond for prisoners challenging conditions under the Eighth Amendment, citing to *Urbain* as one case in a long string citation for support of its conclusion that "no security should be required . . . [for] this preliminary injunction." *Id.*

130. See *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991), *cert. denied sub nom. Snider v. Temple Univ.*, 502 U.S. 1032 (1992) (following *Crowley v. Local No. 82, Furniture & Piano Moving*, 679 F.2d 978 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984)).

131. See *infra* notes 135-45.

132. See *infra* notes 146-49.

133. See *infra* notes 150-64.

134. See *infra* notes 165-75.

tiffs' indigent status is not clear, and there is conflict between the purposes of the bond requirement and the goals of the federal statute on point.

A. No Likelihood of Material Harm

Under the Rule, the court is to set the amount of the bond, "in such sum as the court deems proper, for the *payment of such costs and damages as may be incurred or suffered* by any party who is found to have been wrongfully enjoined or restrained."¹³⁵ It follows that if the court finds that there is no likelihood of harm to the defendant, or "no costs or damages [will be] incurred," then the court has discretion to set the bond at zero, thereby waiving it. Three of the earliest cases to find that the bond requirement was discretionary also found no likelihood of harm to the defendant.¹³⁶ On its face, the Rule's only requirement is that the bond be set in the amount of costs or damages to be incurred by the enjoined party. If the court determines that the defendant will not sustain damage from being enjoined, then there is no reason to set the bond at an amount above costs.

Regardless of the context, courts have required defendants to provide evidence of damages from a wrongful injunction.¹³⁷ However, in some cases, it is quite difficult for a defendant to quantify damages in monetary terms. For example, in *Galper v. United States Shoe Corp.*, involving a dispute over a franchise contract, the defend-

135. FED. R. CIV. P. 65(c) (emphasis added). Courts have based waiver of the bond at least partially on the lack of likelihood of harm to the defendant. See *Crowley v. Local No. 82, Furniture & Piano Moving*, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526, 551 (1984) (minimal burden imposed on defendants from absence of security); cf. *Systems Operations v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1146 (3d Cir. 1977) (declining to decide whether court could waive bond requirement where defendant would not be monetarily harmed by injunction); *Galper v. United States Shoe Corp.*, 815 F. Supp. 1037, 1045 (E.D. Mich. 1993) (finding no bond necessary where defendants would not be harmed by injunction); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974), *cert. denied*, 417 U.S. 932 (stating court may waive bond absent proof of likelihood of harm to party enjoined).

136. The *Urbain* court found "no material damage [would] ensue to appellants from the failure of the District Judge to require [a] bond." *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 816 (6th Cir. 1954), *cert. denied*, 349 U.S. 930 (1955); see also *Clarkson Co. v. Shaheen*, 544 F.2d 624, 632 (2d Cir. 1976) ("little likelihood of harm to the parties enjoined"); *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964) (holding no bond necessary when "there is an absence of proof showing a likelihood of harm"); *Ferguson v. Tabah*, 288 F.2d 665, 675 (2d Cir. 1961) ("[t]here has been absolutely no showing of probable loss because of the restraining order"); *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988) (holding failure to require a bond reversible error "absent circumstances where there is no risk of monetary loss to the defendant").

137. See *Division No. 1, Detroit, Bhd. of Locomotive Eng'rs v. CONRAIL*, 844 F.2d 1218, 1227 (6th Cir. 1988) (stating that defendant must put damages in evidence).

ants did not offer evidence that "maintaining the *status quo* will cause them any injury."¹³⁸ The court found no injury in spite of the defendants' fear that the plaintiff would drive away customers and reduce its business goodwill.¹³⁹

In the Seventh Circuit's consideration of a preliminary injunction to stop the sale of timber in part of a national forest, Judge Posner acknowledged the difficulty of quantifying the intangible loss of enjoyment of the forest in its pristine state (if the injunction were not granted) versus the defendant's damages.¹⁴⁰ The damages to the Forest Service would be the delay in receipt of revenues from the logging until after a full hearing and "would be at most the time value of the profit component of the revenue, a value which no one has bothered to quantify."¹⁴¹ The opinion also discounted the Forest Service's argument that allowing the injunction would cause irreparable damage to its reputation as manager of the national forest because the Service had failed to put forth "any evidence of the aggregate impact of [such] suits" on the timber cutting program.¹⁴²

Similarly, if a court can attribute the impact of the damage of an injunction to another party, it may discount the potential damages in setting the amount of the bond. In *Crowley v. Local No. 82, Furniture & Piano Moving*,¹⁴³ union members brought suit under the Labor-Management Reporting and Disclosure Act challenging the election of the Local's officers.¹⁴⁴ The First Circuit, in considering whether the bond was properly waived by the district court, found that "[n]o great burden will be imposed on [the Union] . . . because the institutional appellant, the Local, whose contributing members include plaintiffs, will bear the costs of compliance."¹⁴⁵ The court's determination that there is no likelihood of material harm is not a true exception—rather, it is a factor to be considered in setting the amount of the bond. On the other hand, waiver of the bond after the court has determined that the defendant will sustain damages if enjoined is an exception to the Rule.

An analogous situation occurs when a court waives the bond for an injunction issued to protect the court's jurisdiction over the subject

138. 815 F. Supp. at 1045.

139. *Id.* at 1044.

140. *Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990).

141. *Id.*

142. *Id.* at 446.

143. 679 F.2d 978, 981-82 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1989).

144. *Id.*

145. *Id.* at 1000.

matter involved.¹⁴⁶ Courts also have not required a bond when the plaintiff was vindicating constitutional rights and the court determined that the defendant would not suffer any "material" damages due to the injunction. These cases have typically involved free speech rights¹⁴⁷ or due process rights¹⁴⁸ and the bond has been appropriately waived.¹⁴⁹ In both types of cases the court does not expect the enjoined party to incur monetary damages.

B. Indigent Plaintiffs and Public Benefits Cases

Courts and commentators have recognized an exception to the bond requirement for indigent plaintiffs challenging the administration of public benefits under a federal statute or the Equal Protection clause.¹⁵⁰ The foundation cases in which bonds were waived for indigent plaintiffs are *Denny v. Health and Social Services Board*¹⁵¹ and *Bass v. Richardson*.¹⁵² In *Denny*, the plaintiffs brought a Fourteenth Amendment challenge to Wisconsin's public benefits statute that required a continuous one-year residence before benefits could be received.¹⁵³ Although the court did not elaborate, it found that the plaintiffs were "poor persons whose present action has been submitted *in forma pauperis*; they are by hypothesis unable to furnish secur-

146. *Ferguson v. Tabah*, 288 F.2d 665, 675 (2d Cir. 1961) (citing *Magidson v. Duggan*, 180 F.2d 473, 479 (8th Cir. 1950), *cert. denied*, 339 U.S. 965); 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2954, at 305 n.36.

147. See, e.g., *McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1328 (D.N.J. 1984) (enjoining city ordinance restricting political speech); *Bukaka, Inc. v. County of Benton*, 852 F. Supp. 807, 813 (D. Minn. 1993) (enjoining enforcement of ordinance regulating nude dancing clubs); *Bloom v. O'Brien*, 841 F. Supp. 277, 284 (D. Minn. 1993) (enjoining state regulation of content of invoices of health care providers).

148. See, e.g., *Cohen v. Coahoma County*, 805 F.Supp. 398, 408 (N.D. Miss. 1992) (enjoining sheriff from "inflicting physical pain upon prisoners in [his] custody . . . for the purpose of coercing information"); *Rivera v. Dyett*, No. 88 Civ. 4707, 1992 U.S. Dist. LEXIS 13464, at *40 (S.D.N.Y. Sept. 10, 1992) (enjoining prison from refusing to provide toilet facilities for disabled prisoner); *Plane v. United States*, 750 F. Supp. 1358, 1374 (W.D. Mich. 1990) (enjoining random urinalysis drug testing of civilian employees).

149. *Dobbs*, *supra* note 9, at 1119-21 (discussing free speech cases and distinguishing those in which defendants are likely to be damaged). While Professor Dobbs was skeptical of giving judges the discretion to not require a bond in "appropriate" free speech cases, *id.* at 1120-21, it appears in the cases cited here that they have used it appropriately.

150. See *Bartels v. Biernat*, 405 F. Supp. 1012 (E.D. Wis. 1975) (waiving bond requirement when injunctive relief sought by poor persons and suit involves important social considerations); *Bass v. Richardson*, 338 F. Supp. 478, 480 (S.D.N.Y. 1971) (stating that indigents should not be required to post bond); *Denny v. Health & Social Servs. Bd.*, 285 F. Supp. 526, 526 (E.D. Wis. 1968) (indigent plaintiffs not required to post bond in action based on equal protection violation); 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2954, at 299-301; *Calderon*, *supra* note 9, at 148.

151. 285 F. Supp. at 527.

152. 338 F. Supp. at 490.

153. 285 F. Supp. at 526-27.

ity."¹⁵⁴ Arguably, waiving the bond requirement for plaintiffs proceeding *in forma pauperis* furthers the goal of providing access to the courts for those plaintiffs who would otherwise be denied life-sustaining benefits until the conclusion of a trial on the merits.¹⁵⁵

The *Bass* court was much more specific about its reason for waiving security than was the court in *Denny*. In *Bass*, the plaintiffs sought a preliminary injunction to restrain cut-backs in benefits under New York's Medicaid Program.¹⁵⁶ The court first pointed out that defendants had not made any showing of the amount of damages they would sustain.¹⁵⁷ Second, the court determined that a "more important reason" existed for waiving the bond.¹⁵⁸ The Medicaid statute evidenced "Congressional intent that the programs . . . be vigorously and properly administered. . . . If any difference exists between the language of Rule 65(c) and Congressional intent clearly embodied in the remedial statutes at issue, the federal statutes control."¹⁵⁹ The allegedly unlawful Medicaid cut-back would go unchecked if the bond amount were set at the potentially large costs and damages of the state. *Bass* has been read to stand for the broad equitable principle that the bond requirement should not be imposed if to do so would block judicial access for citizen enforcement under a federal statutory scheme.¹⁶⁰

A case decided four years after *Bass*, *Bartels v. Biernat*,¹⁶¹ was brought by handicapped residents of Milwaukee challenging the administration of a construction contract for bus service under two federal statutes. In waiving the bond requirement, the court used dangerously vague language, basing the waiver on the plaintiffs' inability to afford the security and the "important social considerations" at issue.¹⁶² Factually, however, the plaintiffs in the case were seeking relief under a federal statute and the waiver was granted specifically to "remedy more flagrant abuses in federal administrative programs."¹⁶³ The imprecise nature of the "important social considera-

154. *Id.* at 527.

155. See 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2954, at 299-301.

156. 338 F. Supp. at 480.

157. *Id.* at 490.

158. *Id.* at 491.

159. *Id.*

160. "[T]he legal system has a positive interest in citizen enforcement, and courts sitting in equity should waive bond requirements to encourage citizen suits." Calderon, *supra* note 9, at 150; Crowley v. Local No. 82, Furniture & Piano Moving, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1983) (citing *Bass* for the proposition that "no bond is required in suits to enforce important federal rights or 'public interests'").

161. 405 F. Supp. 1012 (E.D. Wis. 1975).

162. *Id.* at 1019; see also Calderon, *supra* note 9, at 152 (arguing for an expansive approach and exemption in a "wide variety of public interest cases").

163. *Bartels*, 405 F. Supp. at 1019 (citing *Bass v. Richardson*, 338 F. Supp. 478 (S.D.N.Y. 1971)).

tions" standard has caused predictable problems when applied by other district courts. For instance, courts will often waive the security requirement simply because applicants for injunctions cannot afford the bond,¹⁶⁴ and the district court then considers them "indigent." Such waivers should not be applied when no federal statute is involved.

C. Other Public Interest Litigants

Many of the cases dealing with indigent plaintiffs are also brought in the public interest. The confusion that permeates the indigent applicant exception also abounds in defining which suits are brought in the public interest and in determining which other situations appropriately warrant waiver of the bond requirement.

Another major public interest exception was developed through a line of cases that dealt with the National Environmental Policy Act (NEPA), which became effective in 1970.¹⁶⁵ Section 102(c) of NEPA requires federal officials to file an environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment."¹⁶⁶ If a court finds that the procedural requirements of the formal decision-making process of NEPA were not com-

164. See, e.g., *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (finding indigence alone an appropriate circumstance to waive bond); *Brown v. Giuliani*, 158 F.R.D. 251, 270 (E.D.N.Y. 1994) (waiving bond based on plaintiffs' inability to afford it in challenge to city's AFDC processing guidelines); *Doe v. Perales*, 782 F.Supp. 201, 206 (W.D.N.Y. 1991) (waiving bond because plaintiffs did not have sufficient resources to post one in challenge to reduction in Medicaid benefits); *La Plaza Defense League v. Kemp*, 742 F. Supp. 792, 807 n.13 (S.D.N.Y. 1990) (declining to order security when plaintiffs did not have sufficient resources to post it to enjoin HUD from building low-income housing on park); *Governing Council of Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042, 1047 (N.D. Cal. 1988) (bond waived when suit was brought on behalf of mostly indigent persons in dispute over use of tribal land); *Walker v. Pierce*, 665 F. Supp. 831, 843-44 (N.D. Cal. 1987) (bond waived in challenge by indigent plaintiffs to sale of mortgages by HUD); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (N.D. Cal. 1983), *aff'd in part, vacated in part*, *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984) (holding that no security was required when suit was brought on behalf of poor persons in challenge to California prison regulations). In *Temple University*, the court not only looked to the status of the plaintiff, but also balanced the potential hardships to the parties. *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991), *cert. denied sub nom. Snider v. Temple Univ.*, 502 U.S. 1032 (1992).

165. One authority reports,

By June 1975, 332 NEPA cases featuring 54 injunctions had been completed; another 332 cases, with 65 injunctions, were still pending. Since 1974, NEPA cases have been filed at the rate of 100 per year and injunctions have issued at the rate of 12 per year.

WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 9.2 at 818 (citing COUNCIL ON ENVIRONMENTAL QUALITY, 21ST ANN. REP. 234 (1991)). Rodgers also reports that NEPA decisions in the lower federal courts number more than 2,000 as of July 1993. *Id.* § 9.3, at 839.

166. 42 U.S.C. § 4332(c) (1994).

plied with and irreparable harm may result, it may issue a preliminary injunction. In the earliest cases to consider waiving the bond requirement after NEPA became effective, the court considered the plaintiff's likelihood of success on the merits¹⁶⁷ and the plaintiffs' "right to judicial review of administrative action."¹⁶⁸ The court held that NEPA clearly evidenced Congressional intent to have private environmental organizations assist in enforcing NEPA, stating that "[i]t would be a mistake to treat a revenue loss to the government the same as pecuniary damage to a private party."¹⁶⁹

Courts have extended the exception for preliminary injunctions under NEPA to other "environmental litigation." In *California ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, a nonprofit environmental citizen group challenged the amendments to an interstate compact that managed the Lake Tahoe Basin.¹⁷⁰ The district court waived the bond requirement for the nonprofit group and the enjoined party that appealed the injunction.¹⁷¹ Relying on the earlier NEPA cases, the court held it had the discretion to dispense with the security requirement because: the bond requirement would otherwise deny access to judicial review;¹⁷² Congress had provided for private enforcement;¹⁷³ and the plaintiffs showed a strong likelihood of success on the merits.¹⁷⁴

The injunction in *Tahoe Regional* enjoined a private party, however, not a federal agency that had misapplied regulations. The judicial review discussed in the early NEPA cases referred to challenges of federal agency action. The court expanded the meaning of judicial review in *Tahoe Regional* to encompass a planning agency created by

167. *Scherr v. Volpe*, 466 F.2d 1035 (7th Cir. 1972). Probability of success on the merits is one of four factors used to make the initial determination of whether the injunction should issue at all. 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2948.3, at 185. It should only be a determination of whether to grant the preliminary injunction, not a factor in setting the bond. The *Scherr* court also erroneously cited the discretionary language of *Urbain* to support the waiver. 466 F.2d at 1035.

168. *Natural Resources Defense Council v. Morton*, 337 F. Supp. 167 (D.D.C. 1971).

169. *Id.* at 169-70.

170. 766 F.2d 1319, 1319 (9th Cir. 1985).

171. *Id.* at 1325.

172. *Id.* One court inappropriately cited the possibility of denial of judicial review as a reason for waiver of the bond requirement for an employee seeking reinstatement pending trial for wrongful termination. *Jeffreys v. My Friend's Place, Inc.*, 719 F. Supp. 639, 649 (M.D. Tenn. 1989). When denial of judicial review is used as a criterion to waive a bond, it is meant in the sense of judicial review of *administrative action*, and to use it generically, as the court does in *Jeffreys*, expands the exception.

173. *Tahoe Regional*, 766 F.2d at 1326. *But see* *National Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1135 (D.C. Cir. 1992) ("Rule 65(c) 'subsumes such generic policy considerations' as the 'public interest' in encouraging plaintiffs to challenge agencies' interpretations of their governing statutes").

174. *Tahoe Regional*, 766 F.2d at 1326.

the compact and had the actual effect of denying commercial development along the lakeshore.¹⁷⁵

D. Emerging Exceptions for Other Federal Statutes

Courts have extended the reasoning of the NEPA and indigent applicant exceptions by waiving the bond requirement if security would effectively deny access to judicial review¹⁷⁶ or if the suit is brought on behalf of poor persons.¹⁷⁷ Courts may strain to find that defendants will not be harmed and waive the bond on that basis. Waivers for plaintiffs bringing suit under other federal social-policy statutes, such as those governing the Department of Housing and Urban Development (HUD) or the Labor Management Relations Act, have the elements of both public interest legislation and quasi-indigent plaintiffs. Problems in misapplication of the exceptions have occurred when an indigent plaintiff is suing a private party¹⁷⁸ or when there is no federal statute that specifically allows for judicial review. The best illustration of this growing problem is with applications for waiver under a statute such as the Employee Retirement Income Security Act (ERISA).¹⁷⁹

E. Balancing of Interests in Public Interest Cases

In an attempt to avoid some of the confusion engendered by the variations in the other circuits, the First Circuit, without deciding whether the bond was mandatory or discretionary, set out specific factors for determining when a district court should waive the security for an injunction. In *Crowley v. Local No. 82, Furniture & Piano Moving*, the First Circuit reviewed the district court's waiver of the bond requirement for plaintiffs seeking to enjoin the results of a questionable union election under the Labor Management Reporting and Disclosure Act (LMRDA).¹⁸⁰

The *Crowley* court began by acknowledging that different factors were required for setting the bond in commercial and noncommercial

175. *Tahoe Regional*, 766 F.2d at 1326. Professor Dobbs cites another example from the "Birmingham air crisis" in which manufacturers were temporarily restrained from continuing certain emissions in an order issued by the court at 1:45 a.m., based on outdated figures, and later vacated.

176. See, e.g., *Jeffreys v. My Friend's Place, Inc.*, 719 F. Supp. 639, 649 (M.D. Tenn. 1989) (bond waived for wrongfully terminated employee who would otherwise be denied access to judicial review).

177. See, e.g., *Warner v. Ryobi Motor Prods. Corp.*, 818 F. Supp. 907 (D.S.C. 1992) (requiring indigent plaintiffs in ERISA suit to post nominal bond); *Walker v. Pierce*, 665 F. Supp. 831, 843-44 (N.D. Cal. 1987) (waiving bond for indigent tenants in suit against HUD to bar sale of mortgages).

178. See, e.g., *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692 (7th Cir. 1977) (plaintiff suing insurance company).

179. See *infra* Part V discussing this problem in depth.

180. 679 F.2d 978, 989-1001 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984).

cases.¹⁸¹ The court differentiated the commercial cases, finding that the hardship a bond may cause to the commercial applicant is less of a factor because merchant-like parties "can be assumed capable of bearing most bond requirements."¹⁸² The court then summarized the non-commercial cases, in which the rights prosecuted arose out of comprehensive federal health and welfare statutes, and set forth a two-part test based on the reasoning of the indigent-public benefits cases.¹⁸³

First, the court should balance the possible loss to the enjoined party with the hardship that the bond imposes on the applicant. Second, the court should consider the impact of the bond requirement on the enforcement of the important federal right the plaintiff seeks to enforce in order to avoid restricting the federal right unduly. To underscore its point, the First Circuit pointed to the greater adverse effect of the bond when "the applicant is an individual and the enjoined party an institution that otherwise has some control over the applicant," as compared with the situation in which both parties are individuals or institutions.¹⁸⁴

The *Crowley* court found the situation before it, in which individual union members challenged administration of union elections under a federal statute, to be analogous to that of individual benefit recipients who received waivers when challenging denial of benefits under public benefits statutes. One commentator has argued that the *Crowley* test would allow the bond waiver even in the absence of a legislative scheme.¹⁸⁵ However, that interpretation would go beyond the holding of *Crowley*. In *Crowley* the individual members of the union brought suit under a specific federal statute, and a primary consideration of the district court in issuing the injunction was the policy of LMRDA "to encourage union members' suits to vindicate union democracy."¹⁸⁶

The Third Circuit, which had previously held the bond to be mandatory under Rule 65(c), adopted the *Crowley* factors in the exception it carved out in *Temple University v. White*.¹⁸⁷ In *Temple University*, more than 140 hospitals sought to enjoin reductions in Pennsylvania's Medicaid reimbursement rates.¹⁸⁸ The hospitals ar-

181. *Id.* at 1000.

182. *Id.* at 1000.

183. *Id.* (citing *Bartels v. Biernat*, 405 F. Supp. 1012, 1019 (E.D. Wis. 1975); *Bass v. Richardson*, 338 F. Supp. 478, 491 (S.D.N.Y. 1971)).

184. *Id.*

185. Calderon, *supra* note 9, at 159-60.

186. *Crowley*, 679 F.2d at 999.

187. 941 F.2d 201, 219 (3d Cir. 1991), *cert. denied sub nom. Snider v. Temple Univ.*, 502 U.S. 1032 (1992).

188. *Temple Univ.*, 941 F.2d 201, 205.

gued that Pennsylvania's rates were inadequate to meet the requirement of the Social Security Act and that the method used to promulgate the rates did not comply with the Act.¹⁸⁹ The district court ordered the state's Department of Public Welfare to make advance payments to one of the hospitals, Sacred Heart, which was on the verge of bankruptcy, without requiring Sacred Heart to post a bond.¹⁹⁰ The four payments of \$500,000 each were advances against future medical assistance payments.¹⁹¹ The district court required the payments in light of both underpayment of Medicaid rates to Sacred Heart in previous years and the court's belief that it needed to make some adjustment to prevent the insolvency of the hospital in the interim.¹⁹²

The Third Circuit applied the *Crowley* analysis to review whether waiver of the bond was warranted.¹⁹³ In considering the first step of the *Crowley* test, the hardship that the bond requirement would impose, the court found Sacred Heart to be "on the brink of financial ruin" and about to become insolvent without the district court's ordered relief.¹⁹⁴ The Third Circuit balanced its finding against the risk to the defendant, which the district court had determined faced "virtually no risk" in advancing the funds because the hospital would probably be entitled to as much or more money under the state's revised Medicaid plan, once it was properly implemented.¹⁹⁵ Under the second step of the *Crowley* analysis, the Third Circuit acknowledged that the injunction was sought to enforce "important federal rights" under the federal Medicaid statute and that the waiver was in the public interest, since the hospital served a "disproportionate share of low income patients."¹⁹⁶

Thus the two-step analysis articulated in *Crowley*, and adopted by the Third Circuit in *Temple University*, allows for waiving the bond in noncommercial disputes when important federal statutory rights are at issue. While the *Crowley* test provides some necessary guidance to the district courts in two circuits, there remain a good number of deviations from the narrow exceptions described above.

189. *Id.* at 205-07.

190. *Id.* at 206.

191. *Id.* at 218.

192. *Id.*

193. *Id.* at 219.

194. *Id.* at 219.

195. *Id.*

196. *Id.* at 220.

IV. Exceptions Gone Awry? Problems in Setting the Bond Amount

Setting the appropriate bond amount is especially difficult for lower courts in the circuits that have held the bond itself to be discretionary. The "wide discretion" given these lower courts has allowed them to stray more often and further from the original, narrow exceptions. Lower courts in all circuits have attempted to expand the exceptions discussed above, especially when requiring the bond would keep an individual without financial resources from obtaining an injunction. Deviations from the original, narrow applications of the exceptions include reducing the bond amount to reflect the likelihood of success on the merits of the injunction; setting a low amount when the plaintiff appears financially responsible (and ignoring the limitation of *W.R. Grace*); extending the indigency exception to middle-class parties suing their insurers or former employers; or reading Congressional purpose to waive the bond into an expanding number of federal statutes. By far, the most serious and unresolved problem is the number of lower courts that set or waive the security bond without listing any reason whatsoever.¹⁹⁷

A. Imputing Likelihood of Success on the Merits

One of the most problematic developments in the decisions on Rule 65(c) is the courts' willingness to impute "likelihood of success on the merits." The determination of the applicant's likelihood of success on the merits of the case is a crucial element in initially determining whether the injunction should be granted at all.¹⁹⁸ Instead, lower courts have used the factor not only in finding support for the injunction, but also in setting the amount of the bond.¹⁹⁹

197. Without specific findings on the potential damages that could result from a wrongful enjoinder, the appellate court must remand, if a bond was required, or vacate the injunction, if the bond was not required, thus wasting valuable judicial resources. See *Gateway E. Ry. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1142 (7th Cir. 1994) (criticizing the district court for providing no explanation for its decision to set the bond at the chosen figure and remanding). The Federal Circuit has vacated at least two injunctions issued by district courts that did not contain either findings of fact, required by Rule 52(a), or the district courts' reasons for setting the particular bond amount under Rule 65(c). *Chemlawn Servs. Corp. v. GNC Pumps, Inc.*, 823 F.2d 515 (Fed. Cir. 1987); *Digital Equip. Corp. v. Emulex Corp.*, 805 F.2d 380 (Fed. Cir. 1986).

198. 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2948.3, at 185-202. Once the court determines that the likelihood of success and the other necessary factors support issuing an injunction, the court should then go on to determine the separate question of the bond amount.

199. See, e.g., *Moltan Co. v. Eagle-Picher Indus., Inc.*, Nos. 94-5345 & 94-6472, 1995 U.S. App. LEXIS 13500, *14 (6th Cir. June 2, 1995) (affirming district court's waiver of bond based on strength of plaintiff's case); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972) (recognizing plaintiffs' strong likelihood of success on merits weighed in district

Discounting the defendant's potential damages by the court's hasty determination of the plaintiff's likelihood of success at the injunction hearing defeats the compensatory purpose of the bond requirement. Since the court's chance of being wrong after such an attenuated hearing is significant enough to warrant the bond in the first place, discounting the damages by the plaintiff's likelihood of success reduces the protection provided by the bond, both to the defendant and to the court.²⁰⁰

B. Setting Low Amount for Financially Responsible Plaintiffs

Before the Supreme Court's decision in *W.R. Grace*, courts occasionally allowed the bond to be waived where the plaintiff appeared to have the financial resources to pay a judgment if the injunction were wrongfully issued.²⁰¹ The Court, in *W.R. Grace*, adopted the common law injunction bond rule, that recovery for damages is limited to the amount of the bond. This rule renders bond waivers based solely on the plaintiff's solvency manifestly unfair to defendants who would not be able to collect any damages if wrongfully enjoined.²⁰² However, two district courts have considered waiving the bond based on the defendant's financial ability to pay the judgment, ignoring the liability limitation the bond imposes.²⁰³

court's decision to waive bond); *Curtis 1000, Inc. v. Youngblade*, No. C94-4117, 1995 U.S. Dist. LEXIS 1514, at *179 (N.D. Iowa Jan. 27, 1995) (setting bond at amount below defendant's anticipated damages because court found plaintiff's likelihood of success on the merits to be substantial); *Express Mortg. Brokers, Inc. v. Simpson Mortg. Inc.*, No. 94-71056, 1994 U.S. Dist. LEXIS 8764, at *16 (E.D. Mich. May 6, 1994) (waiving bond because plaintiffs demonstrated strong likelihood of successes on merits); *Stern's Miracle-Gro Products, Inc. v. Shark Products, Inc.*, 823 F. Supp. 1077, 1095 (S.D.N.Y. 1993) (setting bond at amount below damage expectancy because plaintiff demonstrated strong likelihood of successes on merits); *Lambton Mfg. v. Young*, 833 F. Supp. 610, 617 (W.D. Ky. 1993) (same). *But see* *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989) (criticizing waivers based on likelihood of success on merits that deprive defendant of any recourse for damages). In *Christ Gatzonis Electrical Contracting, Inc. v. New York City School Construction Authority*, the court considered the likelihood of success on the merits in discussing the bond amount but did not issue the injunction because the plaintiffs had not shown a likelihood of success sufficient to support the injunction. No. CV-93-2418, 1993 U.S. Dist. LEXIS 9147, *18 n.3 (E.D.N.Y. July 2, 1993).

200. *See* *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989) (criticizing bond waivers as denying plaintiff recourse for damages).

201. *See, e.g.*, *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782-83 (10th Cir. 1964) (waiving bond because of plaintiff's apparent ability to pay damages).

202. *Continuum Co.*, 873 F.2d at 803-04.

203. *See* *Diginet, Inc. v. Western Union ATS, Inc.*, No. 91-C-156, 1994 U.S. Dist. LEXIS 7240, *4-5 (N.D. Ill. June 1, 1994) (ultimately holding that the plaintiff was estopped from denying liability above the bond amount); *Specialty Chems. & Servs., Inc. v. Chandler*, No. 1:87-CV-2338-MHS, 1988 U.S. Dist. LEXIS 16090, at *16 (N.D. Ga. Sept. 26, 1988) (finding that plaintiff was "sufficiently solvent to pay defendants' cost should it

C. Defendant's Failure to Show Damages or Request Bond

Appellate courts, in reviewing bond waivers, and district courts, in allowing waivers, have sometimes based the waiver on the defendant's failure to request that the bond be posted.²⁰⁴ Not only have courts increasingly required the defendant to request that the bond be posted or have it waived, but they have also waived it when the defendant failed to provide evidence on damages, without giving the defendant the chance to provide it.²⁰⁵ Even when the defendant does provide damage evidence, courts have increasingly rejected that information because the amount was too "speculative,"²⁰⁶ or "excessive and unwarranted."²⁰⁷ In *Division No. 1, Detroit, Brotherhood of Locomotives Engineers v. CONRAIL*, the Sixth Circuit did the most thorough analysis to date of the evidence required of the defendant to support the bond request amount.²⁰⁸ In *CONRAIL*, the defendant railroad was enjoined from changing the origination point for union engineers and trainmen who worked its Detroit/Toledo route because, the union argued, that origination point had been established through

lose at trial"). *But see Continuum Co.*, 873 F.2d at 804 (allowing plaintiff to file undertaking rather than post full amount of the bond).

204. *See Dignet Inc. v. Western Union ATS, Inc.*, No. 91-C-156, 1994 U.S. Dist. LEXIS 7240, at *5 (N.D. Ill. June 1, 1994) (finding that district court's failure to increase bond amount for preliminary injunction was most likely due to defendant's failure to provide amount to court that would cover damages); *Bukaka, Inc. v. County of Benton*, 852 F. Supp. 807, 813 (D. Minn. 1993) ("Defendant does not appear to object to the waiver and has not pointed to any costs or monetary damages it might incur if it were enjoined from enforcing the code. . . ."); *Galper v. United States Shoe Corp.*, 815 F.Supp. 1037, 1045 (E.D. Mich. 1993) (waiving bond because defendants had offered no evidence that maintaining status quo would injure them).

205. *Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 446 (7th Cir. 1990) (denying injunction but commenting that the Forest Service had not shown the court any evidence of impact on timber program); *Rivera v. Dyett*, No. 88-Civ.-4707, 1992 U.S. Dist. LEXIS 13464, at *39 (S.D.N.Y. Sept. 10, 1992) (waiving because defendant did not provide proof of damages); *Nalco Chemical Co. v. Hydro Technologies, Inc.*, 795 F. Supp. 899, 901 (E.D. Wis. 1992) (justifying bond's waiver because of two-month delay by defendant in requesting bond). The case placing the most extraordinary burden on the defendant is *Wilson v. Office of the Civilian Health & Med. Program of the Uniformed Servs.*, 866 F. Supp. 903, 910 (E.D. Va. 1994), in which the court waived the bond because the defendant had "offered no evidence" to show plaintiff had adequate resources to post bond. *Id.* (emphasis added).

206. *Chambers v. Briggs & Stratton Corp.*, 863 F. Supp. 900, 907 (E.D. Wis. 1994) (setting amount "in absence of any other information from parties").

207. *Practice Mgmt. Info. Corp. v. AMA*, 877 F. Supp. 1394, 1397 (C.D. Cal. 1994) (rejecting defendant's figures for a \$1,750,000 bond as "incompetent hearsay and conclusory evidence" and setting bond at \$100,000). *But see Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 210 (3d Cir. 1990) (criticizing district court's finding that defendant would not be harmed by having \$11 million frozen in bank account).

208. *Division No. 1, Detroit, Bhd. of Locomotives Eng'rs v. CONRAIL*, 844 F. 2d 1218, 1229 (6th Cir. 1988) (discussing the "need for specific evidence" in support of a bond request).

collective bargaining.²⁰⁹ The district court set the bond at \$750,000, based on figures provided by CONRAIL that significant time-delays resulting from the injunction would cause extensive business losses. On appeal, the Sixth Circuit scrutinized CONRAIL's evidence much more closely than had the district court.

First, the appellate court based its skepticism of the high prospective business loss figures on CONRAIL's failure to specifically point to any business it had lost because of time-delays caused by the injunction.²¹⁰ Second, the court was skeptical about the lack of historical data or other evidence provided to support the time-delays, despite the railroad's maintenance of extensive efficiency records.²¹¹ The Sixth Circuit determined that, based on the defendant's vague assertions, the district court was forced to speculate about Conrail's actual loss of business to set the amount.²¹² It remanded to the district court for more specific findings on which to base the bond.²¹³

D. Extending the Indigency Exception

Given the well-developed exception for indigent plaintiffs, some lower courts have strained to find indigency status for plaintiffs, using the term as a proxy for automatic waiver of the bond. These courts often do not consider whether the enjoined party is a government entity, a private company, or even whether the plaintiff is truly indigent, *e.g.*, proceeding *in forma pauperis*. In one case, the court used a very loose definition of indigency to enjoin the Department of Education from publishing the loan default rates for the Canterbury Career School.²¹⁴ While the court omits any explicit reason for waiving the bond,²¹⁵ the paragraph preceding the waiver describes the indigent students who benefit from the school's education; it is a fair assumption that this status was imputed to the plaintiff-school in granting the waiver.²¹⁶

209. *Id.* at 1219.

210. *Id.* at 1228.

211. *Id.*

212. *Id.* at 1229.

213. *Id.* at 1228-29.

214. *Canterbury Career School, Inc. v. Riley*, 833 F. Supp. 1097, 1106 (D.N.J. 1993).

215. "This court . . . finds, in its discretion, that it is appropriate to dispense with such a requirement." *Id.* at 1106.

216. The education "allows a large number of impoverished persons to become productive. . . ." *Id.* at 1105. Compare *Governing Council of Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042 (N.D. Cal. 1988). The court correctly identified the plaintiffs as indigent and waived the bond because the application for injunction was "brought on behalf of a group of mostly indigent persons." *Id.* at 1047. However, the court failed to address the inequity to the enjoined party, who was prevented from operating an asphalt plant and stood to incur significant damages from being enjoined. See *id.* at 1044.

Various courts' treatment of commercial and noncommercial parties as evoking the same concerns has resulted in inequitable treatment of similarly-situated parties. Bonds have been waived for middle-class plaintiffs seeking to enjoin their insurance companies from denying medical benefits²¹⁷ and for terminated employees seeking reinstatement.²¹⁸ Courts have ignored or failed to consider damages to defendants and have based the bond waiver on plaintiff's indigent status, as determined by the court's subjective estimate.²¹⁹ Inconsistent bond waivers and the resulting inequitable treatment of similarly-situated litigants is best illustrated by the situations in the ERISA cases discussed *infra*. The different standards prevailing in three of the circuits, the Sixth, Third, and Fourth, resulted in district courts in those circuits setting widely varying bond amounts.

V. The ERISA Cases

A collection of very similar class-action ERISA cases brought in circuits with different interpretations of Rule 65(c) illustrate the difficulty courts have had in implementing the discretion given to them under the Rule. *Alexander v. Primerica Holdings, Inc.*²²⁰ and *Warner v. Ryobi Motor Products Corp.*²²¹ involved preliminary injunction motions brought by retired employees of companies that were sold and reorganized.²²² As part of each defendant-employer's reorganization, the companies planned to reduce benefits to their retired employees.²²³ Both cases were brought by a class²²⁴ of plaintiffs comprised of

217. See, e.g., *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977); *Ragucci v. Blue Cross & Blue Shield*, No. 2:93CV297, 1994 U.S. Dist. LEXIS 6634, at *8 (W.D.N.C. Jan. 7, 1994); *Wilson v. Office of the Civilian Health & Med. Program of the Uniformed Servs.*, 866 F. Supp. 903, 910 (E.D. Va. 1994) (waiving bond based on "permissive language" of Rule 65(c) and plaintiff's lack of resources).

218. See, e.g., *Jeffreys v. My Friend's Place, Inc.*, 719 F. Supp. 639, 649-50 (M.D. Tenn. 1989) (enjoining defendant from discharging when plaintiff argued reason was jury duty, and waiving bond because of plaintiff's financial condition).

219. But see *Von Grabe v. Ziff Davis Publ'g Co.*, No. 91-Civ-6275, 1994 U.S. Dist. LEXIS 18478, *12 (S.D.N.Y. Dec. 29, 1994) (using the plaintiff's request for *in forma pauperis* status, and his inability to afford the \$1.4 million bond, as factors in denying injunction).

220. 811 F. Supp. 1025 (D.N.J. 1993).

221. 818 F. Supp. 907 (D.S.C. 1992).

222. *Alexander*, 811 F. Supp. at 1026-27 (American Can Co., original employer, merged); *Warner*, 818 F. Supp. at 908 (Singer Co., Motor Products Division, changed ownership through Asset Purchase Agreement).

223. *Alexander*, 811 F. Supp. at 1026 (reducing rights to medical insurance benefits, life insurance benefits, and survivor income benefits); *Warner*, 818 F. Supp. at 908 (modifying or reducing plaintiffs' lifetime medical insurance benefits and Medicare supplement insurance and requiring them to choose a new plan or forfeit benefits).

224. *Alexander*, 811 F. Supp. at 1036 (class of "hundreds"); *Warner*, 818 F. Supp. at 908 (class of 800).

retirees living on fixed incomes.²²⁵ Both defendant-corporations stood to lose at least half a million dollars if enjoined from implementing the benefits reductions.²²⁶

That is where the similarities of the two cases end. In motions to set the bond in each of the two cases, one court rigidly set the bond at over \$7 million,²²⁷ while the other district court diametrically set the bond at a nominal \$250.²²⁸ Given the mandatory nature of the Rule, the lack of guidelines for exceptions, and the split among circuit courts on the amount of discretion allowed the trial court under the Rule, it is no surprise that the courts set the bonds at opposite ends of the spectrum.

The overriding factor in setting the bond in *Warner* was the court's recognition of the plaintiffs' precarious financial condition.²²⁹ The court compared the cost to the two parties but dismissively stated that

the likelihood of damage to Defendants upon the Preliminary Injunction is minimal. In fact, *the only harm* alleged by Defendants is *economic*. . . . Clearly, Defendants are in a much better position to withstand the alleged economic harm than Plaintiffs. This is especially true when considered with the potentially life threatening consequences to Plaintiffs should injunctive relief be denied.²³⁰

The court also based its decision to set the bond at \$250 on the "adverse effect on the public interest," viewing the termination of benefits to retirees in the case as something that "would undermine the integrity of all pension and retirement plans."²³¹

In sharp contrast, the district court in *Alexander* followed the Third Circuit's strict adherence to the "much less discretionary" interpretation of Rule 65(c), requiring that the amount of the bond be greater than a nominal amount and fully reflect defendant's potential damages.²³² The district court distinguished the public interest cases, as defined by the Third Circuit in *Temple University*, from the ERISA case before it, by pointing to the absence of any "threat of loss to the defendant" in *Temple University*.²³³ The concern for potential loss to

225. *Alexander*, 811 F. Supp. at 1032; *Warner*, 818 F. Supp. at 908.

226. *Alexander*, 811 F. Supp. at 1033-34 n.16 (\$429,640 monthly or \$7,733,514 before the case reached trial on the merits); *Warner*, 818 F. Supp. at 909 (\$495,518 annually).

227. *Alexander*, 811 F. Supp. at 1038-39 (\$7,733,514).

228. *Warner*, 818 F. Supp. at 909.

229. *Id.* at 909 (citing plaintiffs' reliance on Social Security income).

230. *Id.* at 909 (emphasis added). It is not clear why the court felt "economic harm" would not be damaging to defendants or why the avoidance of economic harm was not the precise reason for the bond requirement.

231. *Id.*

232. *Alexander*, 811 F. Supp. at 1034 (quoting *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 210 (3d Cir. 1990)).

233. *Id.* at 1035.

the defendant was the overriding principle in determining the bond amount,²³⁴ to the exclusion of all other factors. The court also distinguished *Temple University*, in which the Medicare administrators could easily recoup payments from the hospital if it had been wrongfully enjoined, because the defendant-corporation in *Alexander* could not "practically pursue the various class members in hundreds, if not thousands, of individual lawsuits around the country."²³⁵ Even while acknowledging the plaintiffs' "claims of indigence"²³⁶ the court weighed their indigent status *against* them, finding their indigence would make it more difficult for the defendant-corporation to recoup any overpaid benefits from them.²³⁷

The Michigan Cases

In a more appropriate analysis of ERISA cases, two different district courts set the bond amounts after balancing the equities in a manner similar to the *Crowley* test.²³⁸ Separate suits were brought under ERISA against two different corporations in the Eastern and the Western District courts of Michigan, but the same analysis was used in setting the bond amount. One of the two defendants, Teledyne, Inc., was enjoined from modifying health and life insurance benefits to its retired employees.²³⁹ The second defendant, Kelsey-Hayes Company, was enjoined from modifying the health benefits to its retired salaried²⁴⁰ and union²⁴¹ employees. The plaintiffs in *Teledyne* represented that they would not be able to post more than a nominal bond, while Teledyne estimated that the cost of reinstating its old health benefits would be \$90,000 per month.²⁴² The court held that more than a nominal bond was necessary because of the "large amount of money involved," but set it at \$50,000.²⁴³

The court deciding the bond amount for the injunctions against Kelsey-Hayes also set the amount after balancing the harms to each party.²⁴⁴ First, the court requested that the parties submit briefs on

234. *Id.* at 1035-36.

235. *Id.* at 1036.

236. *Id.* at 1036 n.20.

237. *Id.* at 1036.

238. *See supra* text accompanying notes 180-96.

239. *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1262-63, 1269 (W.D. Mich. 1990).

240. *Helwig v. Kelsey-Hayes Co.*, 857 F. Supp. 1168, 1171 (E.D. Mich. 1994).

241. *Hinckley v. Kelsey-Hayes Co.*, 866 F. Supp. 1034, 1037 (E.D. Mich. 1994) (employees of division in Jackson, Michigan); *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410 (E.D. Mich. 1994) (employees of divisions in Detroit and Romulus, Michigan; Rockford, Illinois; Philadelphia, Pennsylvania; and Springfield, Ohio).

242. *Teledyne*, 751 F. Supp. at 1269.

243. *Id.*

244. *Hinckley*, 866 F. Supp. at 1046; *Helwig*, 857 F. Supp. at 1181; *Golden*, 845 F. Supp. at 416-17.

the amount of the bond that should be required.²⁴⁵ Kelsey-Hayes estimated the cost of reinstating the health benefits to the salaried employees would be \$150,000 per month;²⁴⁶ to union employees in the Jackson plant would be \$87,000;²⁴⁷ and to the union employees in other plants would be \$160,000.²⁴⁸ Kelsey-Hayes requested that two of the bonds be set at \$1 million and the third at \$250,000, all of which the court found to be excessive.²⁴⁹ Following the balancing conducted in setting the injunction against Teledyne and "given the burden placed on defendant," the court set the bonds above a nominal amount at \$95,000, \$100,000, and \$55,000.²⁵⁰

Although both district courts reached the appropriate result, their analyses of the bond amount would have been more clearly supported if they had used the factors enumerated in the *Crowley* two-step analysis. If the courts had used *Crowley*, they would have specifically identified and balanced the possible loss to the enjoined party, the corporate entity, with the hardship imposed on the applicants, the retired employees living on fixed (marginal) incomes. Here, each court recognized the harm the retirees would face under the "irreparable injury" prong that is used to determine if the injunction should be issued. They implicitly balanced the harm to the retirees, otherwise deprived of necessary health benefits at a medically demanding time in their lives, with the burden on defendant of continuing to pay the cost of continuing health benefits of \$90,000 to \$160,000 per month.

Second, under *Crowley*, the court would have considered the impact of the bond requirement on the enforcement of the important federal right the plaintiff sought to enforce.²⁵¹ Again, the courts considered the impact of the bond under one of the four factors used to justify issuing the injunction. In assessing whether granting the injunctions would be in the public interest, they discussed the policy behind ERISA,

"to protect the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, . . . by providing for appropriate remedies, sanctions and ready access to the Federal Court."²⁵²

245. *Helwig*, 857 F. Supp. at 1181.

246. *Id.*

247. *Hinckley*, 866 F. Supp. at 1046.

248. *Golden*, 845 F. Supp. at 416.

249. *Hinckley*, 866 F. Supp. at 1046; *Helwig*, 857 F. Supp. at 1181; *Golden*, 845 F. Supp. at 437.

250. *Hinckley*, 866 F. Supp. at 1046; *Helwig*, 857 F. Supp. at 1181; *Golden*, 845 F. Supp. at 437.

251. See *supra* notes 183-84 and accompanying text.

252. See, e.g., *Teledyne*, 751 F. Supp. at 1268 (quoting 29 U.S.C. § 1001(b)).

Given the directive of ERISA that "access to the Federal Court[s]" be available for "appropriate remedies," the courts properly allowed a reduced bond based on the important federal right that would otherwise be denied if either court had set the bonds at the high amounts requested by the defendants. The Michigan district courts reached the proper results by balancing the same factors the *Crowley* analysis suggests. The *Crowley* test should be used in similar cases brought by plaintiffs under a federal statute.

VI. Policies and Solutions

The security required under Rule 65(c) is mandatory because of the history and the purpose of the Rule. Circuits that held the bond discretionary initially did so only when they determined that the injunction presented no monetary harm to the defendant. While that exception is still warranted, courts must be clear that lack of material harm to the defendant is the reason for the waiver, and they must give defendants an opportunity to present an estimate of harm they believe the injunction will cause.

To properly assess whether a waiver is warranted in a particular case, the court should first determine whether the case is commercial or noncommercial. Commercial cases would be all of those cases involving private litigants as defendants, such as patent or trademark cases, employer-employee disputes, and those involving insurance companies, that are not brought under a federal statute specifically granting judicial review. In commercial cases the primary goal of the bond is to protect the defendant from financial loss from wrongful enjoinder. It is inappropriate in these cases for the district court to balance the equities to both parties of requiring the bond.²⁵³ However, in a case with a large defendant and a small plaintiff, if the court determines that the plaintiff could ultimately meet damages from wrongful enjoinder but may only be able to afford a smaller bond, it may consider allowing the plaintiff to sign an undertaking for the full amount while setting the bond amount much lower.²⁵⁴

A. Commercial and Noncommercial Cases

Provide Specific Findings on the Bond Amount

At a minimum, Rule 65 requires that every order granting a preliminary injunction or temporary restraining order "be specific in

253. See *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988) (vacating injunction because waiver based on balancing of interests in favor of plaintiff in commercial case).

254. See *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 804 (5th Cir. 1989).

terms" and "describe in reasonable detail" the conduct being enjoined.²⁵⁵ The specificity required by section (d) of the Rule is for the protection of defendants and is designed to inform them of the particular action the court is ordering them to take or refrain from taking.²⁵⁶ Prior to the enactment of Rule 65(d), orders granting injunctions were sometimes vague, and defendants had difficulty determining what they had been enjoined from doing.²⁵⁷ District courts should be specific in their determination of injunction bond amounts for the same reason that they must be specific in the injunction order—to avoid treating the defendant unfairly. Since the bond's primary purpose is to protect the defendant, the court should provide the specific findings supporting the bond amount to reassure the defendant that the court has carefully considered the damages the defendant may incur if wrongfully enjoined.²⁵⁸ Vague determinations of bond amounts do not treat individual litigants fairly and may result in inequitable treatment for similarly-situated defendants in the same courthouse, let alone defendants in different circuits.

(2) *Proposal: Amend Federal Rule 65(d) or 52(a) to Require Findings*

The goal of federal courts in setting the bond amount should be to give both parties notice of how they arrived at the particular amount. This will also increase judicial efficiency because appellate courts will have a more complete record to review. Two federal rules deal particularly with the findings required by a court in issuing the

255. FED. R. CIV. P. 65(d). The full text of Rule 65(d) reads:

Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

FED. R. CIV. P. 65(d).

256. 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2955, at 309. "[A]n ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *Id.* at 310.

257. 11A WRIGHT, MILLER & KANE, *supra* note 2, § 2955, at 309.

258. Without such a determination, the appellate court will have nothing to review and may remand for more specific findings, as the Sixth Circuit did in *CONRAIL*. In *CONRAIL*, the district court issued the injunction, and refused to stay its issuance, even though the plaintiff union failed to post the bond the court had set at \$750,000. Division No. 1, Detroit, Bhd. of Locomotive Eng'rs v. CONRAIL, 844 F.2d 1218, 1230 (6th Cir. 1988) (Ryan, J., dissenting). On appeal, the Sixth Circuit determined that the bond amount was unnecessarily high and remanded for determination of a lower bond amount. *Id.* at 1229. The dissent points out that such a policy allowed the union to obtain an injunction to which it was not entitled without posting the bond. *Id.* at 1230. "Thus, the union had its cake and ate it as well." *Id.*

injunction—Rules 52(a) and 65(d). Federal Rule 65(d) addresses the required form and scope of the order issuing the injunction.²⁵⁹ Language requiring the amount of the bond and the factors used in setting it could be added to the Rule. A suggested revision of the Rule might read as follows.

Rule 65(d). Form and Scope of Injunction or Restraining Order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. *The order shall also set forth the amount of the security required to be provided by the applicant before the restraining order or preliminary injunction shall issue.*²⁶⁰

However, since the specificity requirement in the order issuing the injunction is designed to protect the defendant, it may be cumbersome to require the reasoning underlying the bond to be inserted in that portion of the Rule. An alternative revision could be made to Rule 52(a), which requires specific findings of fact to be set forth by the court in its decision and specifically addresses injunctions. The Rule could be amended to require that the "findings of fact" already mandated under the Rule also include those findings used to determine the bond amount. One possible formulation of the Rule might be as follows:

Rule 52. Findings by the Court; Judgment on Partial Findings.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusion of law thereon . . . and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact, *including those findings used to determine the amount of security required*, and conclusions of law which constitute the grounds of its action.²⁶¹

One circuit court has, on two separate occasions, vacated preliminary injunctions when the district court failed to either state its findings of fact under Rule 52(a) or require security under Rule 65(c).²⁶² Rule 52(a) may be the more appropriate location for a requirement to provide particular justifications for the bond amount because judges are

259. FED. R. CIV. P. 65(d).

260. Additions italicized.

261. Additions italicized.

262. *Chemlawn Servs. Corp. v. GNC Pumps, Inc.*, 823 F.2d 515, 517 (Fed. Cir. 1987) (reversing preliminary injunction in patent infringement dispute); *Digital Equip. Corp. v. Emulex Corp.*, 805 F.2d 380, 385 (Fed. Cir. 1986) (same).

accustomed to providing findings for "all actions tried upon the facts without a jury" under the Rule.²⁶³

(3) *Proposal: Require Damage Estimates from Parties*

Of the more than 140 decisions setting the security bond under Rule 65(c) that were reported in the last decade, the bond was waived or set at a nominal amount one-third of the time.²⁶⁴ Courts that did require more than a nominal bond set the amount in round figures of \$10,000, \$25,000, \$50,000, or \$100,000 in more than half the decisions.²⁶⁵ The courts' practice of roughly estimating damages in convenient round numbers would not be alarming if there were not so many bond amounts set without any discussion of how the amount was determined. Since the bond is the only compensation for the defendant if a court later vacates the injunction, courts should be more deliberate in setting the amount.

Courts will readily admit that they do not have enough information to calculate the potential damages, and while some will ask for it,²⁶⁶ others will attempt to set the bond without the necessary information.²⁶⁷ Over the last decade, the high percentage of district court decisions in which there was no reason given for the bond amount²⁶⁸

263. FED. R. CIV. P. 52(a).

264. Of 142 cases decided since 1985 (excluding decisions by appellate courts or bankruptcy courts), the bond was waived or set at zero or a nominal amount 55 times. Search of LEXIS, Genfed Library, U.S. Dist. file, for dollar amounts and Rule 65(c) with verification of individual cases (July 3, 1995).

265. Of 87 cases in which the bond was set above a nominal amount (more than \$1,000): 10 bonds were set at \$10,000; 11 bonds were set at \$25,000; 14 bonds were set at \$50,000; 10 bonds were set at \$100,000; and 42 bonds were set at various amounts from \$6,000 to \$5 million. Search of LEXIS, Genfed library, U.S. Dist. file, for dollar amounts and Rule 65(c) with verification of individual cases (July 3, 1995).

266. See, e.g., *Ireland v. Kansas Dist. of Wesleyan Church*, No. 94-4077-DES, 1994 U.S. Dist. LEXIS 11367, at *24 (D. Kan. July 1, 1994) (giving parties 20 days to negotiate about amount where issue was not previously addressed).

267. See, e.g., *Together Dev. Corp. v. Weiss*, No. 93-C-2323, 1993 U.S. Dist. LEXIS 8028, at *11 (N.D. Ill. June 10, 1993) (admitting that parties provided no damages information but recommending a bond of \$1,000); *Syntex, Inc. v. Interpharm, Inc.*, No. 1:92-CV-03-HTW, 1993 U.S. Dist. LEXIS 10761, at *29 n.1 (N.D. Ga. Mar. 19, 1993) (setting bond at \$50,000 in absence of information from parties, but allowing motions to alter bond amount); *Garney Co., Inc. v. Southwest Water Wells, Inc.*, 92-820-Civ-T-17A, 1992 U.S. Dist. LEXIS 21319, at *5-6 (M.D. Fla. Sept. 14, 1992) (setting bond at \$75,000 even though neither defendant nor plaintiff addressed the issue in memoranda or in oral argument); see also *Gateway E. Ry. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1135 (7th Cir. 1994) (remanding for a more definite statement of reasons for bond amount).

268. For a sampling from a variety of circuits see, e.g., *Cabral v. Olsten*, 843 F. Supp. 701, 704 (M.D. Fla. 1994) (\$25,000, citing only the plaintiff's "medical history and the likelihood of success on the merits"); *Anacomp, Inc. v. Shell Knob Servs.*, No. 93-Civ.-4003, 1994 U.S. Dist. LEXIS 223, at *48-49 (S.D.N.Y. Jan. 10, 1994) (\$125,000, "under the circumstances of the instant case"); *Cottman Transmission Sys. Inc. v. Martino*, C92-7245,

indicates that district courts require more guidance in both determining the amount and identifying the factors to consider in setting the bond amount.

In all cases involving an injunction bond, courts should require that an estimate of damages be provided by the defendant, while giving the plaintiff an opportunity to refute the estimate. The proper approach would be to instruct the parties to submit briefs on the amount of the bond that should be required²⁶⁹ or set a separate hearing to hear proof on the bond.²⁷⁰ First, the court must figure the appropriate damage amount based on historical data or projections based on similar information; certainly on something more than vague assertions.²⁷¹ Second, the court must then estimate the time that it will take to reach a trial on the merits, and it is best if the parties agree that it is a reasonable time frame.²⁷² The resulting damages calculation should protect the defendant's interests for the estimated length of time it will take to reach a trial on the merits.

B. Noncommercial Cases

In noncommercial cases, such as those involving the vindication of constitutional rights or public benefits rights under a federal statute, waiver may be appropriate. The emphasis in setting the bond in commercial cases balances protection of the defendant with the harm that a denial of an injunction, by virtue of the bond requirement, will cause to the plaintiff. When the injunction will not cause the defendant material harm, as in many constitutional cases, or when the plaintiff will be denied judicial review of administrative action, certain exceptions should be made to the mandatory bond requirement. The

1993 U.S. Dist. LEXIS 18221, at *11 (E.D. Pa. Dec. 27, 1993) (\$25,000); DTH Mgmt. Group v. Kelso, 844 F. Supp. 251 (E.D.N.C. 1993) (\$5,000); Lysaght v. New Jersey, 837 F. Supp. 646 (D.N.J. 1993) (\$15,000); Marigold Foods, Inc. v. Redalen, 834 F. Supp. 1163, 1170 (D. Minn. 1993) (\$200,000); Kraft Gen. Foods, Inc. v. Allied Old English, Inc., 831 F. Supp. 123, 137 (S.D.N.Y. 1993) (\$100,000).

269. Helwig v. Kelsey-Hayes Co., 857 F. Supp. 1168, 1181 (E.D. Mich. 1994).

270. Ireland v. Kansas Dist. of Wesleyan Church, No. 94-4077-DES, 1994 U.S. Dist. LEXIS 11367, at *24 (D. Kan. July 1, 1994) (briefing required on issue of bond amount).

271. Gateway E. Ry. v. Terminal R.R. Ass'n, 35 F.3d 1134 (7th Cir. 1994). See also a good discussion of bond setting factors in *Equipment & Sys. for Indus. v. Zevetchin*, 864 F. Supp. 253, 257-58 (D. Mass. 1994), in which the court defines specifically why \$800,000 security bond proposed by defendant was excessive, why nominal security by plaintiff was unpersuasive, and sets the bond at \$50,000. See also *Practice Mgmt. Info. Corp. v. AMA*, 877 F. Supp. 1394, 1397 (C.D. Cal. 1994) (explaining that \$1,750,000 bond proposed by defendant was excessive, based on "hearsay and conclusory evidence," and setting it at \$100,000).

272. See, e.g., *Curtis 1000, Inc. v. Youngblade*, No. C94-4117, 1995 U.S. Dist. LEXIS 1514, *179 (N.D. Iowa Jan. 27, 1995) (determining that matter could be brought to trial within one year, and setting bond amount accordingly).

most effective way to provide guidance to the lower courts in administering these exceptions is to clarify Rule 65(c).

Proposal: Amend Rule 65(c)

Rule 65(c) should be amended to fully define the exceptions to the mandatory security requirement. First, the Rule should clarify the mandatory nature of the bond requirement by deleting the language "in such sum as the court deems proper." Second, the Rule should be clear that it is up to the defendant to provide evidence to the court of the cost and damages of wrongful enjoinder, particularly if the court will otherwise waive the bond absent evidence of the likelihood of harm. Under such a modification, when no evidence of likelihood of damage is brought forward by the defendant, the court could properly waive it. A suggested modification might read:

Rule 65. Injunctions.

Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant[, in such sum as the court deems proper,] for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. *The court will determine the amount of the security after full consideration of the prospective costs and damages that the enjoined or restrained party may incur, as provided by such party.*²⁷³

Rule 65(c) should also be changed to incorporate the acknowledged exceptions for waiving the bond.²⁷⁴ One proposed rule amendment would require all courts to consider the factors already recognized by many circuits in considering waiver of the bond:

The court may waive or set the bond at a nominal amount only if (1) the order presents no likelihood of harm to the enjoined party; (2) the applicant is found by the court to be indigent; or (3) a federal statute allows injunctive relief to be granted without a bond.

Additionally, in noncommercial cases, the courts should follow the two-step analysis framed by the First Circuit in *Crowley v. Local No. 82, Furniture & Piano Moving*²⁷⁵ and followed by the Third Circuit in *Temple University v. White*.²⁷⁶ Under the *Crowley* analysis, the court balances the possible loss to the enjoined party against the hardship that the bond imposes on the applicant. Second, the court considers the effect of the bond requirement on the enforcement of the important federal right the plaintiff seeks to enforce and tries to avoid restricting the federal right unduly. Under the *Crowley* analysis, the

273. Suggested deletions in brackets, additions italicized.

274. See *supra* Part III discussing each exception in full.

275. 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984).

276. 941 F.2d 201, 219 (3d Cir. 1991), *cert. denied sub nom. Snider v. Temple Univ.*, 502 U.S. 1032, 112 S. Ct. 873 (1992).

courts in the ERISA cases discussed above would have required similar bond amounts, and the similarly-situated plaintiffs and defendants would have been treated more equitably. One district court, using the *Crowley* analysis, appropriately balanced the harms to each party in waiving the bond and properly set forth the court's findings of fact in support of the waiver.²⁷⁷

Conclusion

Rule 65(c) is a mandatory rule that requires security to be posted before any injunction will issue. Despite the mandatory language of the Rule, at least two circuits consider the rule to be discretionary, and other circuits remain undecided about the issue. Lack of clear guidelines in the case law or in the Rule have left the district courts confused and waiving the bond inconsistently. A few carefully considered exceptions have been carved out across circuits, but the district courts have begun to stray from the original, narrow applications and have extended these exceptions in inappropriate cases. Additionally, perhaps the most serious and unresolved problem is the number of lower courts that set or waive the security bond without listing any reason whatsoever. Inconsistent applications of the exceptions have resulted in dissimilar treatment for similarly-situated parties.

Despite the differences among the circuits, guidance could be provided to the district courts through revisions to the Federal Rules. Language could be added to Rules 65 or 52 requiring the court to provide specific findings on the bond amount and the factors the court used in setting the amount. Additionally, Rule 65(c) should be amended to require that the defendant prove damages anticipated from wrongful enjoinder.

Courts have been inconsistent in waiving the bond for parties who, because of inability to afford the bond, would otherwise be denied injunctive relief. Some have granted waiver based solely on such inability, while others have more properly applied the First Circuit's analysis in *Crowley*. Rule 65(c) could be amended to include the acceptable bases that circuit courts have used for supporting waivers, and to define the circumstances in which such waivers have been allowed. Without such revisions to the Federal Rules, district courts will remain confused, and the inequitable treatment of defendants will continue.

277. *McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1328 (D.N.J. 1994).